Presto Supermarkets (Subang) Sdn Bhd & Ors v Attic Holdings Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02 (NCvC) (W)-1248–07 of 2019
YAACOB MD SAM, NANTHA BALAN AND SEE MEE CHUN JJCA
5 FEBRUARY 2024

Landlord and Tenant — Rent — Double rent — Tenancy agreement provided that tenant had to pay double rent under s 28(4)(a) of Civil Law Act 1956 ('CLA') if it failed to restore demised premises to original state upon determination of tenancy — Landlord, on tenant's failure to restore, carried out restoration works at own cost and claimed for double rent for period premises was under restoration — Whether High Court was wrong to allow the claim — Whether since tenant had handed over vacant possession of premises to landlord, mere failure to restore premises to original condition could not be equated to tenant being still 'in occupation' and 'holding over' as per s 28(4)(a) of CLA

The respondent ('Attic') was the owner of a shopping mall in which the first appellant ('Presto') had rented 18,550 square feet of space at the lower ground ('LG') floor of the mall to operate its supermarket for a fixed term period of three years ending 24 June 2017. Presto had generally been unhappy with the tenancy and had often complained to Attic that whenever it rained heavily the LG area would be flooded, preventing customers from entering its premises from the LG car park area. Then there was the complaint of water and other discharges leaking into Presto's premises via the ceiling creating puddles on the floor, foul smell and destroying Presto's stock and equipment (the leakage was found to be coming from a restaurant operating on the floor above the demised premises). Presto felt Attic was not doing enough to address and resolve its complaints. On 4 May 2015, well before the tenancy was due to expire, Presto gave notice that it was terminating the tenancy, thus contravening cl 5.1.4 of the tenancy agreement ('TA') which prohibited Presto from prematurely determining the fixed term and which provided that if Presto did so, it shall be liable to pay Attic the monthly rentals and other charges in full for the remaining unexpired term of the tenancy. Presto returned the keys to Attic on 14 July 2015 and vacated the premises. Attic pointed out to Presto that it was bound under cll 12.6.1 and 9.44 of the TA to restore the premises to its original state failing which it would not only have to bear the restoration costs Attic would incur but also have to pay double rent for so long as the premises remained unrestored to its original state as Presto would be deemed to be still in possession of the premises and thus 'holding over' as per s 28(4)(a) of the Civil Law Act 1956. Presto asked for time to restore the premises but, ultimately, never carried out the work. At the conclusion of the trial of Attic's

A suit against Presto for breach of the TA, the High Court allowed Attic's claim for RM84,826.50, being the costs incurred in restoring the premises to its original state, and also allowed a claim for RM266,120.69 in double rental against Presto for the period 14 July 2015 until 23 November 2015, ie, the period during which the demised premises remained 'unrestored'. The court B also allowed Attic's claims for RM315,899.93, being the outstanding rental payment under the TA, and for RM168,376.43, being loss of rental for the unexpired period of the tenancy. The trial court found Presto's counterclaim unproven and dismissed it. The second and third appellants, who were the directors of Presto, were held fully liable under the letter of guarantee they had C signed to pay all monies owing by Presto to Attic under the TA. In its counterclaim, Presto had alleged that Attic had fundamentally breached the TA by failing to ensure that the demised premises was in a tenantable condition and that Presto had quiet enjoyment during the tenancy period. Presto claimed the incidences of flooding, water leakage and foul smell had chased customers D away and had seriously affected Presto's business. Presto alleged that Attic had not fulfilled its obligations under the TA to ensure that the mall was always kept under good repair and maintenance. Attic denied Presto's allegations and contended that it had always kept the mall under good repair and maintenance but the issues about which Presto had repeatedly complained were matters E beyond Attic's control. Attic also challenged Presto's claim of loss of business by showing evidence that ever since Presto started operating at the mall, its business had grown exponentially such that Presto's outlet at the mall had far surpassed all other supermarket outlets in the Presto group in terms of performance and profitability. The instant appeal was against the whole of the F trial court's decision.

Held, unanimously affirming the decision and orders of the High Court save for the award of RM266,120.69 by way of double rental from 14 July 2015 until 23 November 2015, which award was set aside:

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(1) Having handed over the keys to Attic on 14 July 2015, Presto, factually, was no longer in 'occupation' of the premises and thus could not be 'holding over' as per s 28(4)(a) of the Civil Law Act 1956 ('the CLA'). Presto's failure to restore the premises to its original state (which it H promised to do but did not) after having handed over vacant possession to Attic could not be equated to it being still in occupation of the premises. What Attic sought to do (wrongly, in this court's view) was to claim double rental based on cl 12.6.1 of the TA, the effect of which was that Presto was 'deemed' to be holding over (in occupation) for purposes I of a claim for double rental under s 28(4)(a) of the CLA (see para 53).

(2) A claim for double rental was not a claim for compensation under contract but a claim permitted by statute and which was penal in nature. The period for which the double rental was allowed in the instant case was the same period during which the premises remained in the state in

which Presto had renovated it for its supermarket business. Attic insisted that the premises be handed back in its 'bare state' failing which the premises would be contractually deemed to be still occupied by Presto and held over, thus attracting liability for double rental per cl 12.6.1 of the TA. But Presto had already quit the premises and Attic had carried out restoration works at its own cost for which it obtained judgment for RM84,826.50 at the trial. And Attic was also awarded RM315,899.93 for rentals and service charges for the period from July 2015 till 23 November 2015, which was the same period for which double rental was allowed. The double rental claim clearly overlapped with and was subsumed in the claim for rentals (see paras 44, 46, 48–49, 51 & 53).

(3) Looking at the facts and circumstances, Presto could not be liable for any double rentals. Having regard to the relevant statutory provision and legal principles governing double rental, this court was impelled to the conclusion that the trial judge erred in allowing the double rental claim predicated solely on the contractual provision in circumstances where there was actual handing over of physical possession of the premises on 14 July 2015, albeit not in a 'bare state' (see para 52).

(4) Apart from the issue of double rental, there was no appealable error in the trial judge's findings and conclusion to warrant appellate interference. Having considered all the evidence, the trial judge had come to a decision that was not 'plainly wrong'. His conclusions were supportable on a rational basis and his findings were not in any way repugnant to common sense (see paras 63 & 78).

(5) The issues of flooding and water leakage (and the attendant foul smell it brought) were not caused by Attic. The water leakage emanated from a business premise located above the demised premises whilst the flooding only occurred at the basement car park area whenever it rained heavily. The flood waters, however, never entered Presto's premises. Customers could also park at the ground floor and take the escalator to the lower ground to enter Presto's supermarket. Apart from heavy rainfall being the cause, the flooding was also due to the perimeter drain not being able to hold or maintain the water capacity during heavy downpour. Although the perimeter drain was within the jurisdiction of Majlis Bandaran Petaling Jaya, Attic would nevertheless de-sludge and clean the drains from time to time. The evidence showed quite convincingly that Attic had done everything it could to ameliorate the situation, which was not of its own doing. Presto had therefore not established that Attic was guilty of any fundamental breach of the TA which went to the root of the contract (see paras 79–81 & 85).

(6) The evidence showed quite unmistakably that Presto was able to operate its business at the premises for four years and had managed to achieve the best performance amongst all the Presto outlets and had enjoyed positive

growth in customer traffic and monthly average sales. This evidence suggested that the demised premise was indeed tenantable and fit for the purpose for which Presto rented it. This court agreed with Attic that if the flooding/water leakage incidents had 'destroyed' Presto's business, as it claimed, it would not have renewed the tenancy for another three years from 2014 or even have recommended the premises to a third party (Urban Fresh) to take over the tenancy from Presto (see paras 64 & 73–74).

[Bahasa Malaysia summary

Responden ('Attic') ialah pemilik sebuah pusat beli-belah yang mana perayu pertama ('Presto') telah menyewa ruang seluas 18,550 kaki persegi di tingkat bawah ('LG') pusat beli-belah untuk mengendalikan pasar rayanya selama tempoh tetap tiga tahun berakhir 24 Jun 2017. Presto secara amnya tidak berpuas hati dengan penyewaan itu dan sering mengadu kepada Attic bahawa setiap kali hujan lebat kawasan LG akan dinaiki air, menghalang pelanggan daripada memasuki premisnya dari kawasan tempat letak kereta LG. Kemudian terdapat aduan air dan pelepasan lain yang bocor ke dalam premis Presto melalui siling menyebabkan lopak di lantai, bau busuk dan memusnahkan stok dan peralatan Presto (kebocoran didapati berpunca dari restoran yang beroperasi di atas lantai premis di atas. Presto merasakan Attic tidak melakukan secukupnya untuk menangani dan menyelesaikan aduannya. Pada 4 Mei 2015, sebelum tempoh penyewaan tamat, Presto memberi notis bahawa ia akan menamatkan penyewaan, sekali gus melanggar klausa 5.1.4 perjanjian penyewaan ('PP') yang melarang Presto daripada menentukan tempoh tetap secara awal dan yang mana dengan syarat bahawa jika Presto berbuat demikian, ia akan bertanggungjawab untuk membayar Attic sewa bulanan dan caj lain sepenuhnya untuk baki tempoh penyewaan yang belum tamat. Presto memulangkan kunci kepada Attic pada 14 Julai 2015 dan mengosongkan premis itu. Attic menunjukkan kepada Presto bahawa ia terikat di bawah klausa 12.6.1 dan 9.44 PP untuk memulihkan premis kepada keadaan asalnya jika gagal yang bukan sahaja perlu menanggung kos pemulihan yang akan ditanggung oleh Attic tetapi juga perlu membayar sewa dua kali ganda untuk selagi premis itu kekal tidak dipulihkan kepada keadaan asalnya kerana Presto akan disifatkan masih memiliki premis itu dan dengan itu 'memegang' mengikut s 28(4)(a) Akta Undang-Undang Sivil 1956. Presto meminta masa untuk memulihkan premis itu tetapi, akhirnya, tidak pernah menjalankan kerja itu. Pada akhir perbicaraan saman Attic terhadap Presto kerana melanggar PP, Mahkamah Tinggi membenarkan tuntutan Attic sebanyak RM84,826.50, iaitu kos yang ditanggung untuk memulihkan premis kepada keadaan asalnya, dan juga membenarkan tuntutan sebanyak RM266,120.69 dalam penyewaan berganda terhadap Presto untuk tempoh 14 Julai 2015 hingga 23 November 2015, iaitu, tempoh di mana premis masih kekal 'tidak dipulihkan'. Mahkamah juga membenarkan tuntutan Attic untuk RM315,899.93, sebagai bayaran sewa tertunggak di bawah PP, dan

RM168,376.43, sebagai kerugian sewa untuk tempoh penyewaan yang belum tamat. Mahkamah perbicaraan mendapati tuntutan balas Presto tidak terbukti dan menolaknya. Perayu kedua dan ketiga, yang merupakan pengarah Presto, telah dipertanggungjawabkan sepenuhnya di bawah surat jaminan yang telah mereka tandatangani untuk membayar semua wang yang terhutang oleh Presto kepada Attic di bawah PP. Dalam tuntutan balasnya, Presto telah mendakwa bahawa Attic secara asasnya telah melanggar PP dengan gagal memastikan premis itu berada dalam keadaan boleh disewakan dan Presto menikmati keseronokan yang tenang semasa tempoh penyewaan. Presto mendakwa kejadian banjir, kebocoran air dan bau busuk telah menyebabkan pelanggan lari dan telah menjejaskan perniagaan Presto secara serius. Presto mendakwa bahawa Attic tidak memenuhi kewajipannya di bawah PP untuk memastikan pusat beli-belah itu sentiasa berada di bawah pembaikan dan penyelenggaraan yang baik. Attic menafikan dakwaan Presto dan berhujah bahawa ia sentiasa memastikan pusat beli-belah dalam keadaan baik pembaikan dan penyelenggaraan tetapi isu yang sering diadu Presto adalah perkara di luar kawalan Attic. Attic juga mencabar dakwaan Presto kehilangan perniagaan dengan menunjukkan bukti bahawa sejak Presto mula beroperasi di pusat beli-belah, perniagaannya telah berkembang dengan pesat sehinggakan cawangan Presto di pusat beli-belah telah jauh mengatasi semua kedai pasar raya lain dalam kumpulan Presto dari segi prestasi dan keuntungan. Rayuan semasa adalah terhadap keseluruhan keputusan mahkamah perbicaraan.

Diputuskan, sebulat suara mengesahkan keputusan dan perintah Mahkamah Tinggi kecuali award RM266,120.69 melalui sewa dua kali dari 14 Julai 2015 hingga 23 November 2015, yang mana award telah diketepikan:

(1) Setelah menyerahkan kunci kepada Attic pada 14 Julai 2015, Presto, sebenarnya, tidak lagi 'menduduki' premis itu dan dengan itu tidak boleh 'memegang' seperti dalam s 28(4)(a) Akta Undang-Undang Sivil 1956 ('AUS'). Kegagalan Presto untuk memulihkan premis kepada keadaan asalnya (yang dijanjikan untuk dilakukan tetapi tidak) selepas menyerahkan milikan kosong kepada Attic tidak boleh disamakan dengan ia masih menduduki premis itu. Apa yang Attic cuba lakukan (salah, dalam pandangan mahkamah ini) adalah menuntut sewa berganda berdasarkan klausa 12.6.1 PP, yang kesannya adalah Presto 'dianggap' memegang (menduduki) untuk tujuan tuntutan untuk sewa dua kali di bawah s 28(4)(a) AUS (lihat perenggan 53).

(2) Tuntutan untuk sewa berganda bukanlah tuntutan pampasan di bawah kontrak tetapi tuntutan yang dibenarkan oleh statut dan yang bersifat penalti. Tempoh sewaan berganda dibenarkan dalam kes semasa adalah tempoh yang sama semasa premis itu kekal dalam keadaan di mana Presto telah mengubah suainya untuk perniagaan pasar rayanya. Attic menegaskan bahawa premis itu diserahkan semula dalam 'keadaan kosong' jika gagal yang mana premis itu akan disifatkan secara kontrak

sebagai masih diduduki oleh Presto dan dipegang, sekali gus menarik liabiliti untuk penyewaan berganda mengikut 12.6.1 PP. Tetapi Presto telah pun meninggalkan premis itu dan Attic telah menjalankan kerja-kerja pemulihan dengan kosnya sendiri yang mana ia memperoleh penghakiman sebanyak RM84,826.50 pada perbicaraan. Dan Attic juga dianugerahkan RM315,899.93 untuk penyewaan dan caj perkhidmatan bagi tempoh dari Julai 2015 hingga 23 November 2015, iaitu tempoh yang sama di mana sewa berganda dibenarkan. Tuntutan sewa berganda jelas bertindih dengan dan dimasukkan ke dalam tuntutan untuk sewaan (lihat perenggan 44, 46, 49–48, 51 & 53).

(3) Melihat kepada fakta dan keadaan, Presto tidak boleh bertanggungjawab untuk sebarang penyewaan berganda. Dengan mengambil kira peruntukan undang-undang yang berkaitan dan prinsip undang-undang yang mengawal sewa berganda, mahkamah ini telah terdorong untuk membuat kesimpulan bahawa hakim perbicaraan telah terkhilaf dalam membenarkan tuntutan sewa berganda bersandarkan semata-mata kepada peruntukan kontrak dalam keadaan di mana terdapat penyerahan sebenar pemilikan fizikal premis pada 14 Julai 2015, walaupun tidak dalam 'keadaan kosong' (lihat perenggan 52).

(4) Selain daripada isu sewaan berganda, tiada ralat boleh rayuan dalam dapatan dan kesimpulan hakim perbicaraan yang mewajarkan campur tangan rayuan. Setelah mempertimbangkan semua bukti, hakim perbicaraan telah membuat keputusan yang tidak 'jelas salah'. Kesimpulannya boleh disokong atas dasar rasional dan dapatannya tidak sama sekali bertentangan logik akal (lihat perenggan 63 & 78).

(5) Isu banjir dan kebocoran air (dan bau busuk yang dibawanya) bukan disebabkan oleh Attic. Kebocoran air itu berpunca daripada premis perniagaan yang terletak di premis atas manakala banjir hanya berlaku di kawasan tempat letak kereta bawah tanah apabila hujan lebat. Air banjir, bagaimanapun, tidak pernah memasuki premis Presto. Pelanggan juga boleh meletak kereta di tingkat bawah dan menaiki eskalator ke untuk memasuki pasar raya Presto. Selain hujan lebat menjadi punca, banjir juga disebabkan longkang perimeter tidak dapat menampung atau mengekalkan kapasiti air semasa hujan lebat. Walaupun longkang perimeter berada dalam bidang kuasa Majlis Bandaran Petaling Jaya, Attic akan tetap menyahenap dan membersihkan longkang dari semasa ke semasa. Bukti menunjukkan dengan agak meyakinkan bahawa Attic telah melakukan segala-galanya untuk memperbaiki keadaan, yang bukan disebabkannya. Oleh itu Presto tidak membuktikan bahawa Attic bersalah atas sebarang pelanggaran asas PP yang menjadi punca kontrak (lihat perenggan 79–81 & 85).

(6) Keterangan menunjukkan dengan jelas bahawa Presto dapat menjalankan perniagaannya di premis itu selama empat tahun dan telah

berjaya mencapai prestasi terbaik di kalangan semua cawangan Presto dan telah menikmati pertumbuhan positif dalam bilangan pelanggan dan purata jualan bulanan. Keterangan ini menunjukkan bahawa premis itu sememangnya boleh disewa dan sesuai untuk tujuan Presto menyewanya. Mahkamah ini bersetuju dengan Attic bahawa jika insiden banjir/kebocoran air telah 'memusnahkan' perniagaan Presto, seperti yang didakwa, ia tidak akan memperbaharui penyewaan selama tiga tahun lagi dari 2014 atau bahkan telah mengesyorkan premis itu kepada pihak ketiga (Urban Fresh) untuk mengambil alih penyewaan daripada Presto (lihat perenggan 64 & 73–74).]

Cases referred to

Damansara Realty (Pahang) Sdn Bhd v Om Cahaya Mineral Asia Bhd [2021] 5 MLJ 1; [2021] 5 CLJ 283, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1; [2020] 8 AMR 227, FC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180; [1977] 1 LNS 92; [1977] 1 MLRH 438 (refd)
Rohasassets Sdn Bhd (formerly known as Wisma Perkasa Sdn Bhd) v Weatherford (M) Sdn Bhd & Anor [2020] 1 MLJ 557, FC (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others [1985] 3 WLR 317, CA (folld)

Legislation referred to

Civil Law Act 1956 s 28(4), (4)(a)
Evidence Act 1950 s 114(g)

Appeal from: Writ of Summons No BA-22NCVC-327–05 of 2017 (High Court, Shah Alam)

GK Ganesan (with Leslie Bala, KN Geetha and Pavaani Tanggaveloo) (Murali B Pillai & Assoc) for the appellant.
Phang Soon Mun (with Darren Ee Kin Chung and Chin Choon Loong) (Han & Partners) for the respondent.

Nantha Balan JCA:

INTRODUCTION

[1] This appeal emanates from a dispute between a landlord of a shopping mall and their tenant, who had taken a tenancy of approximately 18,550 sqft of lettable premises at the lower ground floor of the complex known as Citta Mall in the locality of Ara Damansara, Selangor. The landlord filed a suit in the High Court claiming that the tenant had pre-maturely terminated a fixed-term

tenancy for the demised premises. The landlord sued for outstanding rentals, double rental and rental for the remaining period of the fixed term tenancy as well as reinstatement costs. The landlord also claimed general damages.

[2] The tenant filed a counterclaim for their set up costs, losses incurred as a result of the forced sale of their equipment, loss of sales, recovery of rental deposit and general damages. After a full trial the learned judge allowed the landlord's claim, save for general damages (which the High Court held was not proven). The tenant's counterclaim was dismissed. This is an appeal by the defendants against the decision of the learned judge of the High Court dated 26 June 2019 allowing the plaintiff's claim (save for general damages).

[3] The first appellant is Presto Supermarkets (Subang) Sdn Bhd (first defendant — 'Presto'). The second appellant is Azrin @ Farah Azrin bt Zuhdi (second defendant — 'Azrin') and the third appellant is Daniel Bernd Ruppert (third defendant — 'Daniel'). The respondent is Attic Holdings Sdn Bhd (plaintiff — 'Attic'). For convenience, we shall refer to the parties by name ie, first appellant as Presto, second appellant as Azrin, third appellant as Daniel, and the respondent as Attic. Where the context requires, Presto, Azrin and Daniel shall be referred to collectively as 'the appellants'.

BRIEF FACTS

[4] Attic had entered into a tenancy agreement dated 23 May 2011 ('the TA') with Attic's predecessor, Citta Mall Sdn Bhd ('CMSB') for a premise known as Unit LG-01, Lower Ground Floor, Citta Mall, No 1, Jalan PJU 1A/48, PJU 1A, Ara Damansara, 47301 Petaling Jaya, Selangor Darul Ehsan ('the premises') for a period of three years beginning from 25 June 2011 until 24 June 2014 ('tenancy'). Thereafter CMSB sold Citta Mall to Attic via a sale and purchase agreement dated 22 November 2011 and all of CMSB's legal rights and entitlements etc. under the TA/tenancy were then duly assigned to Attic who then stepped into the shoes of CMSB as the landlord of the premises. Thereafter, the tenancy was renewed through a letter of renewal dated 8 July 2014 ('LOR') wherein the tenancy was renewed for a further three years from 25 June 2014 to 24 June 2017. Azrin and Daniel (directors of Presto) are the guarantors of Presto under a letter of guarantee dated 15 July 2013 ('the guarantee') to guarantee and undertake to pay all monies owing by Presto to Attic under the TA.

[5] But through the defence and counterclaim dated 29 April 2016 (paras 7–8 thereof), Azrin and Daniel claim that the guarantee is invalid, null and void as it was procured through and is the product of 'duress' exerted by Attic. We shall deal with this and other issues in the later part of this judgment.

SALIENT TERMS OF THE TENANCY

[6] The salient terms of the TA are:

Clause 5.1.4 of the TA — Fundamental term of the contract

Nothing in the terms herein contained shall give the Tenant the right of determining the Fixed Term of the Tenancy hereby created and notwithstanding any unilateral determination on the part of the Tenant, *the Tenant shall remain liable to the Landlord for the Monthly Rental, and the Monthly Service Charge and any other charges in full for the remaining unexpired period of the Fixed Term* which shall together with any arrears shall be recoverable as a debt due to the Landlord.

Clause 9.4 the TA — Presto shall pay the utility charges;

Clause 9.44 of the TA — in the event Presto fails to reinstate the Premise, Attic may carry out the instatement work and the costs and expenses shall be borne by Presto.

10.1 Quiet Enjoyment

The Landlord shall allow the Tenant to quietly enjoy the Demised Premises during the Fixed Term hereby created without any interruption by the Landlord provided that the Tenant punctually pays the Monthly Rental hereby reserved and all other charges as may be levied and moneys covenanted to be paid herein and observes and performs all the covenants, undertakings, obligations, restrictions, terms, conditions, agreements and stipulations on the part of the Tenant to be observed and performed as herein provided.

...

10.4 Upkeep of Common Area and Provision of Services

In consideration of the payment of the Services Charges and the performance and observance of the other covenants and agreements on the part of the Tenant under or pursuant to this Agreement and subject always to Clause 26, the *Landlord shall or as the case may be, shall ensure that the Management shall:*

...

c) *maintain upkeep replaces and repairs whenever necessary the roof main structures floors external walls main drains pipes wiring cables and all other parts of the Common Area, and the lifts and escalators in good and proper repair and condition at such times and in such manner as the Landlord and/or the Management as the case may be shall in their absolute discretion consider* necessary;

Clause 12.2 — Presto shall pay late interest of 12% per annum;

Clause 12.5 — ... 'In the *event the Tenant terminates* or attempts to terminate the Tenancy herein at any time after the execution of this Agreement before the expiration of the Fixed term and/or the *Renewal Term*, as the case may be, ... *the Tenant shall forthwith pay to the Landlord a sum equal to the Monthly Rental, and the Monthly Service Charge for the whole of the Fixed Term and/or the Renewal Term, as the case may be, or the unexpired period thereof* , as the case may be, ...

...

Clause 12.6 Failure To Yield Up and To Restore on Time

12.6.1 Without prejudice to any other rights and remedies which the Landlord may have against the Tenant, *If the Tenant upon the expiration or the earlier determination of the Tenancy herein fails, neglects and/or refuses to restore and/or yield up vacant possession of the Demised Premises in accordance with the provisions of this Agreement, the Tenant shall be liable to pay to the Landlord a sum equivalent to double the amount of the Monthly Rental or of the rental of the Demised Premises at the prevailing market rate, whichever shall be the higher, pursuant to Section 28(4)(a) of the Civil Law Act 1957* and a further sum equivalent to double the amount of the Monthly Service Charge or of the aggregate of the service charge of the Demised Premises at the prevailing market rate, whichever shall be the higher, as agreed liquidated damages, both sums for every month or part thereof from the date of expiration or earlier determination of the Tenancy herein, to the actual date of due compliance by the Tenant of Clauses 9.44 and 9.45 and indemnify the Landlord against all or any claims by any incoming tenant of the Demised Premises for failure on the part of the Landlord to deliver vacant possession of the Demised Premises to the Incoming tenant.

...

Clause 26.

26. EXCLUSION OF LANDLORD'S LIABILITY

Notwithstanding anything to the contrary herein contained, the Landlord and the Management shall not in any way be liable howsoever to the Tenant or to any of the Tenant's Authorized Persons or to others who may be permitted to enter or use the Demised Premises, the Mall, the Land or any part thereof (including during the Fit-Out Period, if any) for any happenings, accidents, death or injuries howsoever sustained by any of the aforesaid persons or any other persons or for any loss or damage howsoever caused to any properties, merchandise, furniture, fittings, fixtures or equipment whatsoever In the Demised Premises: or any other part of the Mall or the Land or for any loss of business or inconveniences in respect of any one or more of the following occurrences:

(a) *any damage, destruction, defect, leakage or overflow of water or mechanical or other breakdown of any fire sprinkler system, machinery, plant, sanitary or other installations, apparatus or equipment, failure or overload of electric power, cut-off of water supply, telephone line (or other utilities or other facilities or amenities whatsoever at the Demised Premises, the Mall and/or the Land* or any failure or interruption in the provision of any of the services hereinbefore mentioned by reason of necessary repair replacement or maintenance or shortage of fuel material water electricity of labour disputes, inclement cause beyond its control unable to carry out any of the services. Further, if for any cause beyond its control, the Landlord and/or the Management is unable to carry out any of the services for which the Monthly Service Charges are levied and /or contributions are made, the landlord and/or the Management shall also not be obliged to reduce the Monthly Service Charges nor the contributions payable by the Tenant herein';

(b) any closure of the mall for any reasons whatsoever deemed fit by the Landlord in its absolute discretion;

(c) Arising from *the acts or omission, whether negligently, carelessly, internationally or by way of misconduct, default or otherwise of the Landlord and/or the Management* or any of their respective employees, servants, agents, workmen, contractors or any other personnel or any of the tenants, occupiers or owners of the Mall or the Land; and/or

(d) Arising out of any renovation or another works to the structure of the Demised Premises or to any adjacent or neighboring premises or to any part of the mall or the Land for the overall plan of any further development or otherwise as may be undertaken on the land and/or in or to the Mall.

ATTIC'S CASE

[7] According to Attic, Presto prematurely terminated the tenancy on 24 June 2015 by ceasing operation at the premise. In this regard, Presto failed to pay the sum of RM315,899.93 being the outstanding monthly rental, utility charges, late interest and Goods and Services Tax charges ('GST charges'). After Presto's premature termination of tenancy, they failed to reinstate the premise into original condition before the time period given to them — 14 July 2015. Attic hired a contractor to reinstate the premise and incurred RM84,826.50. Attic alleges that vacant possession was returned to them on 23 November 2015 upon the reinstatement works. Therefore, Presto is liable for double rent in the sum of RM266,120.69 and reinstatement costs in the sum of RM84,826.50. The tenancy will only expire on 24 June 2017 but for Presto's premature termination. In this regard, Attic managed to find a new tenant, Village Grocer Holdings Sdn Bhd ('VGH') for the premise wherein the tenancy with VGH commenced on 16 February 2016. Therefore, Presto is liable for the loss of rental for the unexpired term of the tenancy in the sum of RM168,376.43. In addition to the above, due to Presto's breach of the TA and the LOR, they are also liable for the interest of 12%pa.

[8] Further, by virtue of the guarantee, Azrin and Daniel are jointly liable to Attic's claim against Presto. As far as Attic is concerned, their claim is straightforward as Presto failed to pay outstanding rent, pre-maturely terminated the tenancy and failed to reinstate the premises.

[9] It was argued that Presto has no basis to withhold the payment of rent which is rightfully due to Attic. Further, Azrin and Daniel are clearly liable for all sums due under the guarantee. As for Presto's complaint of flooding and water leakage/seepage ie — that the premises was not of tenantable condition and fit for occupation, Attic argues that Presto was able to operate its supermarket business for four years and managed to achieve the best

performance among other Presto supermarket outlets. Attic maintains that the alleged issues of water leakage, flooding and foul smell was beyond their control and has never affected the condition of the premise. Lastly, it was contended that the issues were attended and resolved by Attic each and every time upon receiving reports from Presto. According to Attic they had duly performed its duty of care as the landlord towards Attic in maintaining, upkeeping and repairing the premise in good condition.

PRESTO'S CASE

[10] The case that was presented for Presto, is neatly summarised by the learned judge at para 14 of the grounds of judgment:

> [14] Defendan pula membawa tuntutan balas terhadap plaintif berasaskan perlanggaran kontrak dan kecuaian. Di dalam tuntutan balas mereka defendan menegaskan plaintif gagal menyelenggara kompleks tersebut secara memuaskan hati sehingga menyebabkan berlaku kejadian banjir di dalam kawasan Citta Mall. Banjir tersebut meliputi kawasan parkir di tingkat LG Citta Mall dan akibatnya pelanggan supermarket tidak dapat memasuki supermarket defendan pertama. Selain itu defendan juga mengatakan terdapat air yang menitis dari sebuah restoran di bahagian atas supermarket defendan yang menghasilkan bau busuk dan ini memberi kesan kepada perniagaan supermarket defendan pertama.
>
> Defendan pertama mengatakan plaintif telah melanggar terma kontrak sewaan yang dimasuki kerana gagal memastikan premis sewaan tersebut dan Citta Mall berada di dalam keadaan yang boleh disewa dan gagal memastikan defendan pertama mendapat hak untuk menikmati premis sewaan tersebut dengan tenteram (*quiet enjoyment of the rented premise*). Perlanggaran terma kontrak sewaan ini membolehkan mereka membuat penamatan awal kontrak sewaan. Di samping itu plaintif juga cuai di dalam menguruskan Citta Mall tersebut sehingga menyebabkan defendan pertama mengalami kerugian. Defendan Pertama menuntut plaintif membayar mereka kos mereka untuk menyediakan (*set up*) premis tersebut untuk jumlah RM4.1m, kerugian akibat terpaksa menjual peralatan mereka berjumlah RM1,761,000, kehilangan jualan berjumlah RM13m, deposit dan tuntutan lain berjumlah RM19,415,000. Defendan pertama juga memohon ganti rugi am kerana kecuaian.

[11] The gravamen of Presto's complaint may be stated as follows. Under cl 10.1 and 10.4 of the TA, Attic covenanted and was responsible at all times during the tenancy to ensure:

(a) the quiet and peaceful enjoyment of the premises by Presto;

(b) the cleanliness and comfort of the common area of the premises; and

(c) Attic would maintain and upkeep the premises and the common areas to be fit for the purpose for which Presto rented the property.

[12] The express terms of these obligations are in cl 10 of the TA. The

implied terms were that the Attic would maintain and upkeep the premises and the common area to be fit for the purpose for which the Presto rented the property. This was a matter that went to the root of the contract. Attic knew or ought reasonably to have known, about it. Presto pleaded this implied term at eg paras 15.3, 15.7, 15.8 and 24.3 of the defence and counterclaim. Taken together, the express clauses and the implied term went to the root of the contract as they were fundamental terms of the TA. And the courts have the power to 'infer' and 'imply' such a term into the contract.

[13] Counsel submitted that we should do so. As for Attic's fundamental breaches, it was submitted that during the tenancy, Attic breached its fundamental contractual obligations. For the duration of the entire tenancy, Presto suffered consequences of two kinds of breaches by the Attic. In the interior of the premises there were numerous events of leakage of water and effluents from the roof of the premises ('internal issues'). The second breach concerned matters that occurred outside of the premises — at the common Area. This was to that part of the basement immediately outside the supermarket, through which patrons and clients accessed the supermarket. There were at least 80 'breach events', which had a direct and prejudicial effect on the business going on within the premises ('external issues'). The external issues related to at least 80 incidents of flooding which directly prejudiced and eventually destroyed the business of the supermarket. These two series of 'breach events' were in breach of the express and implied terms of the tenancy agreement, in that the Attic had:

(a) breached its express terms under cl 10 of the TA; and

(b) the implied term to keep the premises in a state fit for the purposes for which the Attic knew the Presto was renting the premise — ie, as a 'boutique supermarket' selling fresh food and related items.

[14] These incidents also (allegedly) rendered the Attic liable under a claim in negligence. These breaches prejudiced Presto's need to upkeep the supermarket in a hygienic and clean condition and caused major loss of sales. According to Presto, they notified Attic of these problems but to no avail. Presto notified Attic verbally and in writing many times: per letters dated 28 June 2012, 7 November 2012, 6 March 2015, 4 August 2015 and emails dated 14 November 2014, 17 November 2014 and 4 May 2015. These were complaints of consistent prejudicial incidents that occurred within the premises (referred to as 'the four detrimental incidents'):

(a) frequently flooding in the basement car park located on the same floor as Presto's business in the premises;

(b) frequent leakage of water at various locations in and around the premises;

(c) debris and smelly water permeated through various locations in the premises because of the leakage of water and flooding; and

(d) debris, unpleasant smell and odour of foul sewage in the basement at the level at which Presto runs its supermarket business, especially after heavy rain and flooding.

[15] It is alleged that despite Presto notifying Attic of all these consistent breaches of its obligations (the four detrimental incidents), Attic did not take any, or any adequate action to rectify these breaches so that the premises are fit for the purpose of renting by Presto under cl 10.1 and 10.4. Consequently, its business having been (allegedly) substantially destroyed, Presto gave notice of its intention to determine the TA by emails dated 23 April 2015 and 6 May 2015 respectively, inter alia, for the following reasons:

(a) despite an excessively long period of protest, Attic did not take any steps to cure the defects which it covenanted to cure;

(b) Attic's inaction and indifference left the first appellant with no other viable option except to terminate the TA;

(c) not being able to tolerate the condition at the premises;

(d) there seemed to be no solution to the flooding; and

(e) Attic's ignorance had caused Presto to suffer severe and intolerable losses due to the incidences of flooding and water leakages.

[16] Presto claims that they were forced to shut down its business operations at the premises on 24 June 2015. Presto took the effort to mitigate losses by finding a replacement tenant (Urban Fresh). Presto consulted Attic on the same. Nevertheless, Attic did not take up Presto's offer to mitigate its own losses. Presto shut down its business operations at the premises on 24 June 2015. On 14 July 2015, they officially handed over the keys of the premises to Attic's representative, and vacated the premises. At the point when Presto determined the tenancy and left the premises, no rentals were outstanding at all to Attic from Presto.

[17] Presto's case hinged heavily and exclusively on their complaint that the premises was unfit for use as a boutique supermarket due to external (flooding) and internal water leakage and stench issues. According to the pleaded case and the oral testimony that was presented, Attic's response was 'reactive' and there was no effort to completely resolve these issues. During the trial, reference was made to a report that was prepared by Beca Carter Hollings & Ferner (SE Asia) Pte Ltd — engaged by ARA Manager (APF) Pte Ltd (parent company of Attic) ('Beca Report'). The Beca Report was in fact a summarised version and the full report (if there was one) was not tendered. At any rate the Beca report was Part

C document. It is significant to note that during the trial (during cross-examination of PW1) counsel for Attic actually stated that they do not have the original of the said document and that they are relying on the tenancy agreement rather than the Beca Report to make out their case. There is no dispute that Presto did shut down its business operations at the premises on 24 June 2015. On 14 July 2015, they officially handed over the keys of the premises to Attic's representative, and vacated the premises.

[18] As far as Presto is concerned, the issues in contention in this appeal are:

Q1: Whether in a fixed term tenancy a clause can be inserted completely barring the tenant [Presto] from determining the tenancy before its expiry no matter how badly the landlord [Attic] breaches its covenants?

a. If the answer to Q1 is No, what guidelines should be set for the construction of such a clause?

Q2: Whether Attic had breached its express and implied obligations under the Tenancy Agreement, especially:

a. the implied term as to continued fitness of the premises for the purpose/s for which it was rented? and

b. the express term to render 'peaceful and quiet enjoyment' of the demised premises under clause 10 of the Tenancy Agreement?

Q3: Can the landlord [Attic] claim 'contractual late payment interest' on outstanding rentals?

a. If Yes, what guidelines should be issued by the court to construe an award of 'late payment interest' on outstanding rentals at the 'contractual rate' of 12.0 % per annum (see clause 12.2 of the agreement)

Q4: Where the tenant [Presto] was not in occupation of the premises, on the proper construction of s.28(4) CLA 1956, could the court award double rentals?

Q5: Could the court grant relief on a clause that was un-pleaded?

Q6: Did Attic plead and prove the guarantee claim against the second and third appellants (Azrin and Daniel) under Letter of Guarantee?

Q7: Did Presto prove that Attic was liable in negligence? Q8: Was Attic liable for the losses that Presto had suffered?

Q9: Whether the trial judge properly appreciated the facts and evidence under the principles enunciated in the Federal Court case of *Ng Hoo Kui & Another v Wendy Tan Lee Peng (Administratrix for the Estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67?

[19] It was argued for Presto that the exclusion clause in cl 26 of the TA is cast widely to avoid any liability arising from the contract. It was also contended that the issue of 'pre-mature' termination of the tenancy per cl 5.1.4

of the TA cannot be relied upon by Attic as it was not specifically pleaded in the statement of claim. This is dealt with in the later part of this judgment.

WITNESSES

[20] The following witnesses testified for Attic.

(a) Ms Wong Sue-May ('PW1') (Attic's centre manager);

(b) Ms Wong Pooi Pooi ('PW2') (Attic's finance manager); and

(c) Mr Ooi Meng Khin ('PW3') (Attic's operation manager).

[21] The witnesses who testified for Presto are:

(a) Zulkefli bin Ibrahim ('DW1') (general manager at Citta Mall from January 2015 to June 2015); and

(b) Daniel Bernd Rupert ('DW2') (third appellant — Director of Presto).

[22] During the trial, parties had agreed that the Part C documents in Bundle B3 be admitted except a Part C document, 'Laporan daripada Citta Malaysia — Beca Report' at pp 554–580 of Bundle B3. Attic takes the position that the appellants failed to produce the original copy of the said document nor to call the maker of the said document and to testify as to its contents. Hence, the said *Laporan daripada Citta Mall* remains as Part C document and was accordingly marked as an ID document only rather than as an exhibit.

HIGH COURT — ORDER DATED 26 JUNE 2019

[23] The High Court allowed Attic's claim and granted the following:

(a) *RM315,899.93* being the outstanding rental payment under the TA;

(b) *RM266,120.69* being the *double rent* from 14 July 2015 until 23 November 2015;

(c) *RM168,376.43* being loss of rentals for the unexpired period of the tenancy;

(d) *RM84,826.50* being the costs of reinstatement incurred by respondent;

(e) interests of 12%pa; and

(f) costs of RM35,000.

[24] The appellants on the other hand, filed a counterclaim against Attic for, among others:

(a) a sum of *RM4,100,000* being the set up costs;

(b) a sum of *RM1,761,000* being the loss suffered by appellants due to the forced sales of equipment;

(c) a sum of *RM13,200,000* being the loss of sales;

(d) a sum of *RM354,885* being the deposit paid by appellants under the tenancy;

(e) general damages; and

(f) and costs.

HIGH COURT — GROUNDS OF JUDGMENT

[25] The High Court's reasons for allowing Attic's claim and dismissing the counterclaim may be gleaned from the following paragraphs of the grounds of judgment:

> KEPUTUSAN
>
> [28] Berdasarkan fakta yang disetujui dan keterangan yang dikemukakan saya dapati perjanjian sewaan yang dimasuki di antara pihak-pihak tidak membolehkan perjanjian sewaan tersebut ditamatkan lebih awal oleh defendan pertama. Klausa 5.1.4 perjanjian sewaan dengan jelas memperuntukkan:
>
> > Nothing in the term herein contained shall give the tenant the right of determining the fixed term of the tenancy hereby created and notwithstanding any unilateral determination on the part of the Tenant, the Tenant shall remain liable to the Landlord for monthly rental, and the monthly service charge and any other charges in full for remaining unexpired period of the fixed term which shall together with any arrears shall be recoverable as debt due to the Landlord.
>
> [29] *Terma perjanjian ini adalah jelas dan perlu ditafsirkan secara lateral. Di dalam Syarikat Binaan Utara Jaya v Koperasi Serbaguna Sungai Gelugor Bhd* [2009] 2 MLJ 546; [2009] 1 CLJ 786 Mahkamah Rayuan menegaskan:
>
> > [17] From the available authorities, the following propositions may be advanced in construing a contract where the language employed is clear:
> >
> > (a) the court must give effect to the plain meaning of the words, no matter how distasteful the result may be (*The Central Bank of India Ltd Amritsar v The Hartford Fire Insurance Co. Ltd.* [1965] AIR Vol 52, 1288 SC);
> >
> > (b) where the language in the document is unambiguous and clear, the real nature of the document is to be determined solely by looking at its contents, uninfluenced by any intention of the parties (*Nawab Major Sir) Mohammad Akbar Khan v Attar Singh and Others* [1936] AIR Vol 23, 171 PC);
> >
> > (c) when the minds of the parties are expressed in an unambiguous manner, the court cannot override the declared intention of the parties unequivocally expressed (*K Appukuttam Panicker and Another v SKRAKR Athappa Chettiar and Others* [1966] AIR Vol 53, 303 Kerala); and

A

(d) there is no scope, at all, for drawing upon hypothetical considerations or the supposed intention of the parties when the words contained in the contract are clear and unambiguous (*The Union of India v Kishorilal Gupta and Bros.* [1959] AIR Vol 46, 1362 SC).

B

[30] Berdasarkan peruntukan yang jelas tersebut kedua-dua pihak terikat dengan terma yang disetujui. Dari keadaan di dalam kes ini saya simpulkan niat kedua-dua pihak semasa memasuki perjanjian tersebut adalah untuk tempoh sewaan tersebut terus berjalan sehinggalah tempohnya tamat dan defendan pertama tidak boleh menamatkan perjanjian tersebut lebih awal. Oleh itu kesucian kontrak yang dmasuki perlu dihormati. Ini selari dengan keputusan Mahkamah Persekutuan di

C

dalam *Kumpulan Darul Ehsan Bhd v Mastika Lagenda Sdn Bhd* [2017] 4 MLJ 561; [2017] 7 CLJ 525 yang menegaskan:

D

[23] In considering question 1 it must be taken into account what the parties agreed to in the SSA. In this case there were two crucial matters agreed upon, namely, the option right and the waiver provision. As such those terms must be considered in the light of the legal principles, to wit, that the sanctity of a contract must be preserved and that it is not the function of the court to rewrite the agreed terms in a contract (see: *The Pacific Bank Bhd v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153; [2015] 3 CLJ 717).

E

[24] Accordingly, since the plaintiff and the defendant had clearly agreed to the terms in the SSA such as cll 9.8, 9.9, 19.9 and 19.11 they should be bound by them. And since 'no failure or delay by any party in exercising any rights hereunder or conferred by law shall operate as a waiver thereof' we find no basis to call upon equity in aid to the case of the defendant. As such, we agree with the

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Court of Appeal that in this case laches and unreasonable delay do not arise. But on the issue of limitation, we agree with the findings of the High Court and the Court of Appeal that in this case limitation had not set in. Indeed, the period of limitation should start to run upon the exercise of the option by the plaintiff and followed by the failure of the defendant to comply with the demand for refund of the purchase price and not from the time of TNB's

G

[31] Jika pun klausa ini kabur, tafsiran yang menepati kehendak komersil perlu dipakai. Di dalam *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 Mahkamah Persekutuan melalui Zainun Ali FCJ telah menegaskan:

H

[68] Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of *Arnold v Britton and others*), where His Lordship accepted the unitary process of construction in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 para 21 that:

I

... if there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

[32] Perjanjian sewaan yang dimasuki di antara kedua-dua pihak secara jelasnya

melibatkan premis untuk kegunaan komersil. Di dalam keadaan sedemikian, secara komersilnya kedua-dua pihak memang berniat tempoh sewaan tersebut secara tetap dan tidak ditamatkan secara pra matang kerana penamatan awal perjanjian sewaan akan memberi kesan komersil ke atas tujuan premis tersebut disewakan. Jika perjanjian tersebut ditamatkan lebih awal oleh plaintif, defendan pertama akan mengalami kerugian terpaksa keluar dari premis tersebut dan kemungkinan kehilangan pelanggan. Sebaliknya jika perjanjian sewaan ditamatkan lebih awal oleh defendan pertama plaintif akan kehilangan faedah sewaan ke atas premis tersebut dan kesusahan mendapatkan penyewa baru.

Ini diperkuatkan dengan peruntukan gantirugi untuk bagi tempoh sewaan seperti di dalam klausa 5.1.4 iaitu:

> ... and notwithstanding any unilateral determination on the part of the Tenant, *the Tenant shall remain liable to the Landlord for monthly rental, and the monthly service charge and any other charges in full for remaining unexpired period of the fixed term* which shall together with any arrears shall be recoverable as debt due to the Landlord'

[33] Terma-terma perjanjian yang dimasuki, termasuk terma tentang sewa bulanan dan bayaran-bayaran lain mengikat defendan. Plaintif telah membuktikan terdapat sewaan tertunggak yang gagal dibayar oleh defendan. Klausa 5.1.4 di atas jelas memperuntukkan jika perjanjian ditamatkan secara pra matang oleh defendan pertama, defendan pertama masih perlu membayar sewaan bulanan yang diperuntukkan.

[34] Bagaimanapun defendan mengatakan plaintif gagal mematuhi terma perjanjian yang menghendaki mereka memastikan premis sewaan tersebut sentiasa berada di dalam keadaan sesuai untuk disewa (*tenantable condition*) dan ini membolehkan perjanjian tersebut ditamatkan awal. Saya telah putuskan di atas kedua-dua pihak terikat dengan terma perjanjian yang dimasuki. Apabila saya meneliti perjanjian sewaan tersebut, saya dapati tidak terdapat terma di dalam perjanjian sewaan yang memberikan hak kepada defendan untuk membuat penamatan awal kerana plaintif telah melanggar terma perjanjian. Jika pun terdapat terma yang memberikan hak tersebut, defendan pertama perlu membuktikan plaintif telah melanggar terma berkaitan. Berdasarkan keterangan yang dikemukakan saya berpuas hati tidak terdapat keadaan yang menunjukkan premis sewaan tersebut di dalam keadaan yang tidak sesuai disewa.

[35] Tidak dinafikan terdapat kejadian banjir yang berlaku dan terdapat air yang bocor memasuki premis sewaan dari sebuah restoran di atas. Saya dapati kejadian banjir yang berlaku di luar kawalan plaintif dan plaintif telah berusaha mengatasinya. Defendan telah bergantung kepada laporan Beca untuk membuktikan plaintif gagal mengambil tindakan untuk mengatasi banjir tersebut. Mengenai laporan yang disediakan oleh Beca ini, defendan yang menimbulkan perkara tersebut dan defendan perlu mengemukakan keterangan mengenainya dan defendan tidak boleh meletakkan beban tersebut ke atas plaintif. Keterangan DW1 tidak mencukupi untuk membuktikan laporan yang disediakan dan defendan pertama tidak boleh bergantung kepada keterangan DW1 untuk membuktikan perkara tersebut.

A [36] Berdasarkan keterangan yang dikemukakan saya dapati plaintif telah melaksanakan tanggungjawabnya di bawah perjanjian sewaan yang dimasuki secara munasabah dan perjanjian sewaan tersebut telah ditamatkan secara pra matang oleh defendan. Defendan sebenarnya melanggar terma perjanjian sewaan dan klausa 5.1.4 perjanjian memberikan hak kepada plaintif untuk menuntut jumlah ganti B rugi di bawah paragraf 31(a), (b) (d) dan (f). Oleh itu tuntutan plaintif di dalam paragraf-paragraf tersebut dibenarkan

[37] Klausa 5.1.4 juga memberi hak kepada Plaintif menuntut sewaan bagi tempoh perjanjian yang belum tamat. Untuk tuntutan di dalam para 31(c) saya dapati plaintif telah membuktikan mengalami kerugian bagi tempoh kontrak yang belum C tamat iaitu sewa yang patut mereka perolehi sehingga tempoh sewaan tersebut tamat. Bagaimanapun plaintif berjaya memperolehi penyewa baru premis tersebut dan ini mengurangkan kerugian plaintif bagi kehilangan sewa. Oleh itu ganti rugi sebanyak RM168,376.43 dibenarkan.

D [38] Plaintif juga menuntut ganti rugi am akibat perlanggaran kontrak oleh defendan apabila menamatkan perjanjian secara pra matang. Bagaimanapun saya dapati plaintif tidak mengemukakan apa-apa keterangan tentang kerugian yang dialami mereka. Oleh itu tuntutan plaintif ke atas ganti rugi am tidak dibenarkan.

[39] Defendan kedua dan ketiga terikat dengan jaminan yang mereka berikan di dalam surat jaminan. Saya dapati tidak ada keterangan yang menunjukkan jaminan E yang diberikan tersebut tidak sah dan terbatal. Oleh itu tuntutan plaintif terhadap defendan pertama, defendan kedua dan defendan ketiga dibenarkan dengan kos.

TUNTUTAN BALAS DEFENDAN

F [40] Tuntutan balas defendan pertama diasaskan kepada perlanggaran kontrak dan juga cuai. Saya telah memutuskan plaintif tidak melakukan perbuatan-perbuatan yang melanggar terma perjanjian yang menghendaki plaintif memastikan premis sewaan tersebut berada di dalam keadaan sesuai untuk disewa dan defendan pertama dapat menikmati nikmat sewaan mereka dengan tenteram. Oleh yang demikian defendan pertama gagal membuktikan tuntutan balas mereka terhadap plaintif berasaskan kontrak. Tuntutan plaintif untuk kerugian berasaskan kontrak G ditolak.

[41] Defendan juga mengasaskan tuntutan balas mereka terhadap plaintif berdasarkan tort kecuaian. Saya bersetuju dengan hujah defendan pertama bahawa plaintif mempunyai tugas berhati-hati terhadap orang-orang yang secara sah memasuki Citta Mall yang dimiliki dan diuruskan plaintif. Defendan pertama H memasuki premis tersebut berdasarkan perjanjian sewaan dan secara sah menjalankan perniagaan dipremis tersebut. Oleh itu plaintif mempunyai tugas berhati-hati untuk memastikan keselamatan defendan dan barang-barang defendan pertama yang menjalankan perniagaan supermarket tersebut.

I [42] Defendan juga perlu membuktikan plaintif telah melanggar tugas berhati-hati tersebut. Isu ini perlu diputuskan berasaskan keterangan yang dikemukakan. Saya dapati plaintif telah melakukan perbuatan-perbuatan yang munasabah bagi memastikan defendan pertama dan barang-barang defendan pertama yang berada di dalam premis sewaan selamat dan terlindung dari kerosakan. Saya dapati plaintif tidak melanggar tugas berhati-hati tersebut. Oleh itu defendan pertama gagal

membuktikan kecuaian plaintif dan tuntutan balas defendan pertama terhadap plaintif untuk ganti rugi am kecuaian juga ditolak dengan kos.

OUR DECISION

[26] The first issue is whether there were several incidents of external flooding and internal water leakage issues affecting the premises. Here we pause to clarify that the flood waters which backed up into the basement level of the Mall did not enter the premises. But the mere presence of flood water in the lower ground level is of course off-putting for any potential customer. However, it was established that customers could, if they wanted to, drive to the ground floor and take a travellator to the lower ground floor to access the Presto supermarket.

[27] Despite the issues which were raised by Presto, they did have a substantial return of investment and generated profits and managed to establish themselves as the most profitable supermarket under the Presto chain. As with most cases, it is almost always safer to examine the contemporaneous documents (exchange of correspondence) which touch on the issues at hand plus associated matters which would paint a correct picture of the state of affairs which prevailed at the material time. In this regard, we note that PW1 was rather cautious not to agree that the complaints by Presto were rampant. She said rather colourfully that the complaints did not occur 365 days in a year and that each time they were raised, action was taken. To this end, PW1 was able to refer to contemporaneous documents pertaining to remedial work vis a vis the internal leakages or flooding. There was no real challenge to her evidence in this respect. Her evidence may well suffer from an innate inability or refusal to accept that there were several occasions on which these problems had surfaced. In comparison, PW3 (Ooi) was more candid and after some degree of cajoling during cross-examination he accepted that there were several occasions on which these problems were raised by Presto. But the real question is whether Attic did or did not effectively and promptly attend to these problems as and when they arose. We will deal with this question in the concluding part of our judgment. For present purposes, we think that it is only appropriate to refer to some of the correspondence between the representatives of Attic and Presto touching on the issues at hand. The logical starting point is when Presto sought the renewal of the tenancy.

RENEWAL OF TENANCY

[28] Presto's letter to Attic Holdings on 14 March 2014 — renewal:

CONFIDENTIAL

Term Renewal Discussion-Citta Mall

A Your letter dated 7 March 2014 refers

We do acknowledge your openness to negotiate your Initially proposed rental and appreciate your revised offer of RM3.30/sqf. Even though we still find this offer above prevailing market rates considering your foot traffic and occupancy rates, we intend to make it work, thus accepting your offer, subject to some conditions,

B

A closure/move of the Presto Citta Mall is a route we only want to take if we have lost all hope in a successful future at Citta Mall. *But despite substantial concerns about the Citta Mall management* and the owner's commitment, we still have hope due to the upcoming surrounding developments.

C *Nevertheless, we believe that both of us have to do some clean-up and significant improvements*. As you may know, our competitor Jaya Grocer will be opening within the next 12–14 months at our neighbouring mall Pacific Place. We are convinced that by then we can be a better supermarket than Jaya Grocer. However, even then we will be losing out if Citta Mall remains as it is now. Because it's not only about

D how good a supermarket is but also what else can be offered to customers by the mail. As we hear, Pacific Mall is pushing quite aggressively and is signing up tenants fast. it is assumed that by the time the mall opens, the occupancy (number of tenants over available lots) is above 70%. This would make the mall substantially more interesting and popular than Citta Mall.

E In this case, Presto would be losing out and a substantial number of drive-in Presto customers would switch to Pacific Place and Jaya Grocer.

Therefore, you must understand us that we need to have commitment from the Citta Mall owners that the mall will be upgraded/improved within the next 12 months in a way that makes it competitive enough to withstand the upcoming

F competition. We are happy to sign an NDA if this is an issue. But we need to understand and believe your plans for the near future. If you can't give us any of this, then we must have an exit clause in our renewal terMs We will be unable to sustain business for another 3 years if Citta Mall remains on its current level/popularity while Pacific Place opens in 2015 with a high number of occupancy.

G On our end, we also need to Improve. We acknowledge that. Our Improvements are, however, difficult to implement as our cash flow remains negative. As you may know Presto Citta Mall is a separate company with different shareholders from our other outlets, hence, we are unable to invest from our other companies into Presto Citta. And after almost 3 years of losses, it is difficult to raise new money for

H investments in Presto Citta.

We did improve well until October 2013; our sales increased every month reaching RM1.4 in October 2013. But then the Tesco opening next-door brought us back to RM1.2 and less. See graphs in appendix. Before the opening, we were confident to reach RM1.5m/month by Jan 2014.

I

It is noteworthy though that most customers remained our customers as we were cheaper than Tesco in most sections, and have a much better and fresher quality items The 17-18% loss of sales is mainly due to non-food items (like diapers, toilet paper, etc) where Tesco has a large price advantage over us. But wherever the loss comes from [sic] hurts us as we are back into monthly losses.

We do require your continuous support in the form of the monthly credit notes as we had started it back in 2013 until we reach a sales level of RM1.5m/month. If you discontinue the support and increase the rental at the same time, our rental costs almost doubles making it Impossible for us to improve until traffic goes up with the new Oasis development next to Citta.

If you continue the support of the monthly rental reduction/credit note as before, we are able and willing to give you our commitment. These are some points we are willing to commit to you to improve our side:

...

We believe there is no point entering into a new term with continuous blame, faults and denials on both sides. Presto has a fighting chance to become the preferred choice of grocery shopping in Ara Damansara but only if Citta Mall can keep ahead of its emerging competition.

Same applies to Citta Mall: without Presto, Citta Mall will lose its main driver for shoppers to come to Citta and a potential Presto replacement is highly doubtful considering the mall situation and its competition.

We hope you can accept our proposal and we looking forward to your commitments.

Thank you.

Sincerely,

Presto Supermarkets (Subang) Sdn Bhd

PRESTO'S COMPLAINTS — 2014

[29] Next, we refer to a letter from Presto dated 14 November 2014

Dear Sue-May,

The situation with the water leakages is not ending, but getting worse. For more than 3 year or more have on and off, left and right, water leakages from our ceiling. Attached photos from today and yesterday. You also see the damages caused by the leakages to our flooring.

Even though, I know your team is aware and trying to 'fix' but that doesn't change the fact that we had and have this issue affecting our image and business. For whatever reason or fault, it is unacceptable.

The quality of our rented premise does not justified the current rental. Please let us know what rental compensation you can offer us.

Please also forward us the owner's contact names and address, ie board of directors and shareholders of Attic Holding.

Thank you.

Best regards,

A Daniel Ruppert

[30] The next document is Daniel's email on 17 November 2014 which reads as:

B 17 November 2014

Dear Sue-May,

In addition to my email on November 14 please also note these additional photos which show the water flooding on the car park floor still happening.

C Customers are unable to reach or leave the mall entrance without getting wet feet. These pictures were taken on November 14.

We view this issue as part of your need for compensation to Presto. We are looking forward to hearing from you.

D Thank you.

Best regards,

Daniel Ruppert

E **[31]** The next document is Wong Sue May's email to Daniel on 24 November 2014. It reads:

Dear Daniel,

I refer to your emails received on 14 & 17 November 2014 respectively.

F *Leakages*

As you have pointed out, we are working towards rectifying the most recent leak. Since the leak was brought to our attention, my team has been in constant communications with your Mr Raymond & our investigations have shown that there are two possible sources-sunken road behind Block C (Las Delicias) & Tokyo Kitchen's kitchen. As communicated to Mr Raymond, a technical test was carried out earlier this week & we believe we have identified part of the source to be Weer coming from Tokyo Kitchen. We have since spoken to Tokyo Kitchen & they will be rectifying this. On Friday night, my to has put in temporary measures to divert the drip to the nearest discharge point whilst waiting on Tokyo Kitchen to undertake the rectification works.

G

H

In all fairness, Presto renewed its lease which expired in June knowing full well the condition on site & therefore this shouldn't be used as means of negotiating for lower rents/rebates/compensation. It was also part of the renewal term that the Landlord will not be extending any rebates to Presto. Furthermore, pursuant to clause 26 of the TA, we are not able to offer you any rental rebates or compensation.

I

Flooding on 14 November 2014

The flooding in the Lower Ground car park was caused by a torrential thunderstorm in our area for which I'm sure you will agree, we have no control over. Therefore, it

is unreasonable to hold us responsible for the flooding. In addition, as stated above, pursuant to clause 26 of the TA, we are not able to offer you any rental rebates or compensation.

PRESTO'S COMPLAINTS — 2015

[32] In terms of the situation in 2015, it is relevant to refer to a letter from Presto dated 1 March 2015 which reads:

> On 01/03/2015 22:12, Raymond Lau wrote:
>
> Dear Sue May
>
> On this hour around 7.30pm started a small leaking from the ceiling of my Drinks section and after a while 5 minutes later the second drop started at my second passage way and while ago approx 9.15pm the biggest disasters happen the leaking is getting worse with water coming from the ceiling non stop at my Oriental section. The water bring bad smell to my store and it chase away some of my customers.
>
> I immediately inform your night duty Maintenance Head Yasrul and he says he is working on it. Without wasting time I also contacted Mr Hanif your Maintenance Head and he is very helpful by responding by complaint
>
> From the info I have the leaking is from Tokyo Kitchen. Mr Hanif requested Tokyo Kitchen owner to come down and see my situation and we do discuss the situations. The owner inform me that they also have flood at their floors but there is no any leaking from their kitchen piping.
>
> So may I know who is going to responsible and repair for the leaking? How long it will take?
>
> This is very embarrassing moments for my store especially my customer even Mall reputation with a bad maintenance facilities
>
> The leaking may damaged my stocks also Best regards,
>
> Raymond Lau

[33] Thereafter on 6 March 2015 Presto wrote:

> Dear Sir/Madam,
>
> Complaint about 1.3.2015 Water Burst Inside Premise LG-01 Complaint about 26.1.2015 Car Park Flooding
>
> On 1 March 2015, we had another water burst in our premises with large amounts of smelly water coming through multiple locations on the celling near Bakery/Oriental Section, right in the middle of our main customer corridor. This incident turned customers away, and made a negative Impression on the remaining customers
>
> Despite efforts from your maintenance team to solve the problem, we had continuous water dripping (also smelly water) at multiple locations on our sales

floor for 4 days. During that time we had to close a few sections (approx. 50sqf) of our sales floor and protect our inventory from water.

On 26 January 2015, the entire Lower Ground car park was flooded again (we complained about the same occurrence last on 14 November 2014) and it was even worse this time. The water around the Lower Ground mall entrance was at least 2–3 inches high making it impossible for customers to walk between their cars and our store without getting wet feet. At 2 locations on the LG car park, there was a water-fountain-like burst of water gushing onto cars and the floor. Customers complained, and our store suffered again from lost sales as well as the negative impression and experience left behind with customers.

It is the mall's responsibility to keep the mall and our store premise tenantable, eg accessible for our customers and allowing our business to be conducted without interruptions from leakages mentioned above.

However, you continue to fall in carrying out this responsibility

Yours sincerely,

Presto Supermarkets (Subang) Sdn Bhd

[34] On 23 April 2015 Daniel (DW2) wrote:

From: Daniel Ruppert [mailto:daniel@presto.my]

Sent: Thursday, 23 April, 2015 9:07 AM

To: Zulkefli Bin Ibrahim

Cc: Azrin Zuhdi

Subject: Fwd: draft

Dear En. Zul,

Thanks for meeting us today.

As discussed, we have to close our Presto outlet in Citta Mall. We have tried to make it profitable since our inception 4 years ago but until today it has not become viable. The regular water flooding issues and sewage smell on our customer's car park floor are making it difficult to maintain a loyal customer base. Furthermore, with the opening of Evolve including a Jaya Grocer outlet in immediate proximity, the competition will Increase sharply.

We propose the following:

1) [sic] will co-operate and assist in convincing a new supermarket to take over our lot. We already have a supermarket who interested to start ASAP-subject to further discussions.

2) We require a Settlement Agreement between us which allows us to terminate the current Tenancy Agreement without any further legal actions from either side. Parallel to this, the landlord executes a new Tenancy Agreement with the new supermarket tenant.

3) We will sell and hand-over some assets to the new tenant. After which, we will close the company Presto Supermarkets Subang) Sdn Bhd.

We want to highlight that time is critical. The new supermarket tenant needs time in order to build up the customer base before Jaya Grocer opens. We are not able to convince any supermarket to move into Citta if they don't have a sufficient 'head start. In fact, our potential new tenant wants to take over as early as 2 weeks from now. Hence, in the interest of all, we hope we can expedite this.

Please note this email and discussion is still strictly P&C. No staff or public announcement has been made and I appreciate if we can keep the discussion within this circle until then.

Thank you

Best regards,

[35] On 4 May 2015 at 5.46pm, Daniel wrote:

From: Daniel Ruppert [mailto:daniel@presto.my]

Sent: Monday, 4 May, 2015 5:46 PM

To: Zulkefli Bin Ibrahim

Cc: Jered Ong Urban Fresh; Azrin Zuhdi

Subject: Presto, Citta Mall

4 May 2015

Without Prejudice

Dear En. Zul,

As per my last email and our discussion thereafter, we would like to proceed with the closure/moving of our Citta Mail outlet.

For the interest of all parties, we are assisting in a replacement for Presto at Citta Mall and would like to propose Urban Fresh, founded and owned by Datuk Ong. The new tenant would take over our entire store as is.

We have a draft agreement between us but it is still subject to all 3 parties agreeing on terms:

The new tenant, Urban Fresh, is proposing the following TA terms to you:

1A) rental for first term flat at RM2.50/sqf, or 1B) RM2.30/sqf or 2% of monthly sales (whatever higher);

2) 9 years years lease (5 terms) with any rental increase at term renewal capped at 10%;

3) A&P rebate of 10% of monthly rental-for-first-year;

4) The running electricity costs for aircond to be part of the landlord's costs, ie the rental is inclusive of Aircon electricity costs

A 5) Store must be handed-over by 1 June

All other terms as standard. Please let us know your feedback on this.

For Presto to agree on the asset sale deal with the new tenant, we require from the landlord a tenancy settlement/exit agreement in which both parties agree to
B terminate early in good terms, meaning no legal action full and timely refund of all deposits, and no other financial penalties.

All 3 agreements (TA, exit agreement, asset sale) can only be executed together and simultaneously.

C Time-wise, we are targeting to handover to the new tenant asap as the new tenant needs time to build up customer base before Jaya Grocer opens at near by Evolve.

The new tenant needs 2–3 weeks to prepare the store for re-opening. Nevertheless, we reserve all rights.

D Best regards,

Daniel Ruppert

[36] On 4 May 2015 at 6.06 pm (termination of tenancy) Presto wrote:

E From: Daniel Ruppert [mailto:daniel@presto.my]

Sent: Monday, 4 May, 2015 6:06 PM

To: Zulkefil Bin Ibrahim

Cc: Azrin Zuhdi

F Subject: Presto closure

Without Prejudice

4 May 2015

G Dear Zul,

As a separate email to you/landlord only, we also need to reiterate the fact that we will close Presto Citta Mall in any case-even without a new tenant taking it over-due to the water/smell circumstances inside our premise and Citta Mall car park.

H *If we are unable to close or move the store and are not allowed to exit our existing TA prematurely in good terms, then you leave us no other option but to claim failure of the landlord's obligations on the mall (continuous water flooding, sewage water ponding and smell) and pursue a legal path of our early exit.*

Nevertheless we reserve all rights.

I Best regards

Daniel Ruppert

THE BECA REPORT

[37] Having identified some of the correspondence as a sampling of the correspondence between the parties, we may now turn our attention to the Report by Beca Carter Hollings & Ferner (SE Asia) Pte Ltd — engaged by ARA Manager (APF) Pte Ltd (parent company of Attic) ('Beca Report'). During the trial, counsel for Presto was only able to produce a copy of the document which was in any event a summary of a much larger (thicker) document which was not produced. The Beca Report was marked as an identification ('ID') document and was not converted into an exhibit. Until the end of the trial the Beca Report remained as a Part C document. The part that was harped on was the following comment in the Beca Report which read as:

> Public perimeter Road Side Drain was constructed approximately 500mm above the ingress road level with an effective depth of 1000mm in general.
>
> Due to lack of maintenance, stagnation of water and sediments were observed over the entire perimeter drain.
>
> During heavy down pour, the water flowing down the ramp to basement could not be pumped out to the drain due to insufficient drain capacity hence causing backflow and flash flood in basement.
>
> Regular cleaning and clearing of Road Side Drain are essential to minimize the flooding issue.

[38] In our view, being a Part C document, the Beca Report carried no weight as it is not evidence before the trial court. In *Damansara Realty (Pahang) Sdn Bhd v Om Cahaya Mineral Asia Bhd* [2021] 5 MLJ 1; [2021] 5 CLJ 283 (CA) this court had dealt with the issue of documents in Part C and stated relevantly:

> [161] Indeed, it can be seen from the plaintiff's submissions in the High Court that RM10.8m was sought as an alternative to their original claim for wasted expenditure. In our view, the judge should not have entertained the submission for RM10.8m and ought to have confined herself to the claim that was allowed ie, para 29 of the SOC (subject to assessment). Thus, the only question is whether the plaintiff had tendered the requisite evidence to prove their claim for wasted expenditure.
>
> [162] On this score, there is no dispute that the documents that were relied upon were Part C documents. They remained in that category right until the end of trial and until the decision on damages was delivered.
>
> [163] The plaintiff had the burden of admitting those documents as exhibits by laying the factual foundation and by invoking the court's discretion under s 32 of the Evidence Act 1950 or s 73A of the Evidence Act 1950 as the case may be. No doubt, this would have been a laborious and tedious task. But there is no easy alternative.

[164] It appears that the plaintiff merely relied on Part C documents to prove its claim for wasted expenditure, which was an erroneous strategy. The burden on the part of a party who relies on Part C documents was lucidly explained by Wong Kian Kheong JC (as he then was) in *KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases* [2014] MLJU 1405; [2014] 1 LNS 427; [2014] AMEJ 1458 (HC) where he said relevantly:

> 34. If a document is classified as a Part C Document, the party adducing that document bears the evidential burden to satisfy the court on a balance of probabilities the following 2 conditions of admissibility of that document (2 Conditions of Admissibility):
>
> (a) in accordance with the rule against documentary hearsay, the maker of the Part C Document has to be called as a witness-the Federal Court's judgment in *Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 6 MLJ 593; [2005] 4 CLJ 1 at 20, 21–25 and 28. If the maker of a Part C Document cannot be called as a witness, the party adducing that document has to satisfy the court regarding the application of any one of the exceptions to the hearsay rule such as ss 32(1)(a) to (h) (s 32(i) and (J) EA only apply to criminal proceedings according to s 32(2) EA), 33 to 37, 73A(1), (2) and/or 90A(1) EA (s 90C EA provides that s 90A EA shall prevail over, among others, any other provision of EA relating to the proof of evidence); AND
>
> (b) 'primary evidence' of the Part C Document as understood in s 62 EA must be adduced in court as required by s 64 EA-the Supreme Court's decision in *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1, at 631. It is to be noted that Explanation 3 of s 62 EA provides that a document produced by a computer (in compliance with s 90A EA) is primary evidence.
>
> If 'primary evidence ' of a Part C Document is not available, s 64 EA provides that 'secondary evidence' (within the meaning of s 63(a) to (e) EA) of the Part C Document can only be admitted as evidence if there is proof of the application of any one of the paragraphs in s 65(1)(a) to (g) EA.
>
> 35. The 2 Conditions of Admissibility need not be fulfilled in respect of Part A Documents and Part B Documents.
>
> 36. As the 2 Conditions of Admissibility apply to a Part C Document, O 34 rule 2(2)(i) RC allows any party to apply to court for directions during pre-trial case management to 'ascertain ' whether the opposing party still insists on the classification of that document as a Part C Document. Order 34 rule 2(2)(i) RC empowers the court to 'make such order or give such direction as is necessary to achieve the just, expeditious and economical conduct of the trial'. I am of the considered view that if a party still insists on categorising a document as a Part C Document, namely to put the opposing party to fulfil the 2 Conditions of Admissibility, that party is entitled to do so but the court may make a note of such a conduct by that party. Such a conduct may be subsequently taken into account by the court in deciding whether to award costs after trial and if so, how much — Order 59 r 8(b) RC (conduct of all parties, including conduct before and during proceedings).
>
> 37. In view of O 34 r 2(2)(d), (e) and (i) RC, cases decided on agreed bundle of

documents before the advent of RC such as the Supreme Court case of *Jaafar Shaari & Anor v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509; [1997] 4 AMR 3744 and the High Court's judgment in *Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor* [1998] MLJU 382; [1999] 1 CLJ 601; [1998]4 AMR 3936, in my respectful opinion, should be read with caution.

[165] Clearly, the issue of classification of documents (Part C documents) could and should have been sorted out at the case management stage, if not before the liability stage, then at least before the assessment of damages stage. At any rate, what is clear is that the plaintiff relied on Part C documents at the assessment of damages and these were not proven as per the Evidence Act 1950 and admitted as exhibits.

[166] As regards the judge's reliance upon disputed documents, we think that it is appropriate to mention that in *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] MLJU 2225; [2010] 9 CLJ 785; [2010] 2 MLRA 668 FC (at paras 32–36) the Federal Court reversed the findings of the Court of Appeal which had relied upon 'disputed' documents to make the impugned findings of fact.

[167] In the result, we are impelled to the view that there was no evidence to support the claim for damages under the heading of 'wasted expenditure' (prayer 35(2) of the SOC).

[39] Still on the question of the admissibility of a Part C (ID) document, we think that it is useful and indeed necessary to remind ourselves of the lucid statement made by Justice Eusofe Abdoolcader (as he then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 183; [1977] 1 LNS 92; [1977] 1 MLRH 438 where he said:

It is necessary to refer to certain exhibits which have been put in in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the Bank for the years 1973–74 and 1972 respectively. As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto. I would mention in passing that the Minute Book of United Manufacturers which was put in as an exh (D23) at the behest of counsel for the second accused has not been referred to at all throughout the case.

[40] On the other hand, it was suggested rather forcefully on behalf of Presto that an adverse inference under s 114(g) of the Evidence Act 1950 should be drawn against Attic for not producing the main Beca Report and the summary and to tender it through the maker. In our view, if Presto was of the view that that the main Beca report was in their favour and could have been an important evidential building block to establish that Attic was guilty of a fundamental breach of its obligations to upkeep and maintain the premises then it was

wholly incumbent upon them to produce it themselves or make an application and compel Attic to produce the main Beca Report. All that Presto had done was to produce a copy of the summarised report. And Presto relied on DW1's evidence to introduce the Beca Report.

[41] As mentioned earlier, DW1 is someone with an axe to grind and not much reliance could be placed on his testimony as to the contents of the main Beca Report which was not before the court. As such it is speculative to even suggest that the main Beca Report, if produced would be unfavourable to Attic. There are several matters which must necessarily be considered before the makers of the Beca Report can vilify Attic, including Attic's Standard Operating Procedures for building maintenance, cleanliness, flood prevention, water leakage and generally, the efforts, action and steps taken to overcome the flooding and leakages. In this regard, it would have been relevant to ascertain whether the makers of the Beca Report were aware of Attic's inability to do anything about the structure and size of the perimeter drain as it fell within the ownership and jurisdiction of Majlis Bandaran Petaling Jaya and whether this would have influenced their opinion as to Attic's scope of responsibility.

[42] In the circumstances, it is highly speculative and indeed convenient to suggest that the main Beca Report would have vilified Attic. That document should have been introduced through its maker(s) and they ought to have been cross-examined as to their knowledge if any, of what Attic had done in respect of the problems which were being raised by Presto. As such, we do not how s 114(g) of the Evidence Act 1950 can be called into aid in these circumstances. In any event, the notes of proceedings shows quite clearly that Presto was not relying on the Beca Report to establish their case against Attic. Counsel for Presto actually said that he was relying on the TA to establish that Attic was in breach. That really is the end of the matter as far as the Beca Report or any other version of it is concerned.

DOUBLE RENTAL

[43] We now deal with Attic's claim for double rental. The law on double rentals was clearly and lucidly stated by the Federal Court in *Rohasassets Sdn Bhd (formerly known as Wisma Perkasa Sdn Bhd) v Weatherford (M) Sdn Bhd & Anor* [2020] 1 MLJ 557 (FC). The Federal Court defined holding over as 'holding over simply means an act of continuing to be in occupation of the premises after the expiry of the tenancy. What matters is the reason for the holding over'. The Federal Court went on to enunciate the following principles that are germane to a landlord's claim for double rental. These are to be found in the following passages from the Federal Court's judgment:

> [89] But that said, it does not mean that holding over simpliciter is all that the landlord needs to prove in a claim for double rent under s 28(4)(a) of the Civil Law

Act. *To entitle the landlord to charge double rent, there must be failure or refusal by the tenant to give up possession after being told to do so by the landlord. This has to be so because the landlord's claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss the tenant causes the landlord in refusing to give up possession*: *Panicka*.

[90] At the risk of repetition, it needs to be emphasised that the court's duty in a claim under s 28(4)(a) of the Civil Law Act is merely to determine whether the option to charge double rent had been exercised properly and lawfully by the landlord. The court is not concerned with contumacious conduct on the part of the tenant who holds over. Even if the tenant is not guilty of contumacious conduct, the tenant is still liable to pay double rent if the landlord has decided to charge double rent and does not consent to the tenant's holding over and has asked the former tenant to vacate the premises.

[91] Therefore, the question in the present appeal is not whether the respondents were holding over contumaciously or otherwise after the expiry of the tenancies. The question is whether they were holding over with or without the appellant's consent, express or implied by conduct. We do not think s 28(4)(a) of the Civil Law Act can be construed to mean that double rent is chargeable irrespective of whether consent to hold over has been given by the landlord or otherwise.

[92] On the facts of the present case, it is clear that the respondents' holding over was with the tacit approval of the appellant. This was also the concurrent findings of fact by both courts below and we see no reason to interfere with such findings of fact.

[44] In the present case before us, the claim for double rental is contractual as it straddles a period when vacant possession had in fact been given by Presto to Attic on 14 July 2015 and ending on 23 November 2015. The double rental period is actually the period during which the premises remained in its 'renovated' state. These renovations were carried out by Presto for the purposes of operating the supermarket. Attic insisted that the premises should be handed over in its bare state failing which the premises would be contractually deemed as being held over thus attracting the liability for double rental per cl 12.6.1 of the TA, which reads, '... If the Tenant upon the expiration or the earlier determination of the Tenancy herein fails, neglects and/or *refuses to restore* and/or yield up vacant possession of the Demised Premises in accordance with the provisions of this Agreement, the Tenant shall be liable to pay to the Landlord a sum equivalent to double the amount of the Monthly Rental or of the rental of the Demised Premises at the prevailing market rate, whichever shall be the higher, pursuant to Section 28(4)(a) of the Civil Law Act 1957 ...'.

[45] Thus cl 12.6.1 contractually caters for a situation where it is not actual holding over, and where there is absent any contumacious or deliberate behaviour suggesting that Presto was refusing to hand over the premises. The question is — whether after the tenant has actually delivered physical possession of the demised premises, the landlord can rely on a clause which

A obliges the tenant to restore the property to its original state to maintain that the tenant is holding over?

[46] In this regard, we are wholly alive to the fact that after 14 July 2015, ie after the keys had been handed over Presto had asked for extensions of time to restore the premises to its 'bare state' and ultimately, they failed to do so and so Attic had to do the reinstatement at their own cost, for which they made a claim. The critical question is — since Presto failed to comply with the TA and restore the premises to its bare state, were they therefore 'holding over' as a matter of law? Before us, it was therefore argued for Presto that the learned judge erred in awarding double rental to Attic under s 28(4) of the Civil Law Act 1956 for 'holding over' from 14 July 2015 to 23 November 2015.

[47] Counsel argued that on the proper interpretation of s 28(4) of the Civil Law Act 1956, the learned judge failed to appreciate that there had to be two elements under the act: first, the amount is only chargeable if possession is not given up by the tenant or for the period for which the land has been detained. The other element is contumacious conduct by the tenant. The Federal Court in *Rohasassets* has already opined that contumacious conduct is not an element that must be established. Hence, that issue does not even arise.

[48] But, as rightly submitted by counsel for Presto, to grant that prayer, Presto has to 'hold over'. Here, Presto handed over possession on 14 July 2015. No doubt, at all times, Attic's lawyers had informed Presto that double rentals (per the TA) would be chargeable until the premises are restored to its bare state. And for its part Presto did ask for extension of time to restore the premises to its bare state. But finally, Presto did not do so. And Attic had to carry out the restoration works and incurred a sum of RM84,826.50.

[49] The question is — did Presto 'hold over' after 14 July 2015? According to the TA, Presto is deemed to be liable for double rentals for so long as the premises are not restored to its bare state. In our view, a claim for double rental is not a claim for compensation under contract. It is a monetary claim permitted by statute and which is penal in nature. Hence, the claim must be scrutinised with utmost care to determine the true state of affairs.

[50] Factually, Presto was not in occupation of the premises as they had already handed over the keys to Attic's representatives. Further, this is a fixed term tenancy by which the tenant (Presto) was not at liberty to determine the tenancy or any renewal thereof (without the consent of the landlord) and contractually remained liable to pay the monthly rentals and service charges as if they were still occupying the premises.

[51] And it is not without significance that at para 14 of the statement of

claim Attic had claimed RM315,899.93 as the rentals for the period from July 2015 to 23 November 2015 which is the same period for which double rentals are being sought.

[52] Looking at facts and circumstances here, we are of the view that Presto could not be liable for any double rentals. In our view, having regard to the relevant statutory provision and legal principles governing double rental, we are impelled to the conclusion that the learned judge had erred in allowing the double rental claim predicated solely on the contractual provision in circumstances where there was actual handing over of physical possession of the premises on 14 July 2015, albeit not in a bare state, but that is taken care of by a claim for reinstatement expenses, which was claimed and rightly allowed.

[53] Having handed over the keys on 14 July 2015, Presto was as a matter of fact, not in 'occupation' of the premises and thus they could not be 'holding over' as per s 28(4) of the Civil Law Act 1956. This is underscored and augmented by the fact that Attic had already claimed for rentals and service charges for the same period per para 14 of the statement of claim, which was allowed. The claim for double rental per paras 22–23 of the statement of claim is clearly overlapping with and is subsumed in the claim for rentals in para 14 of the statement of claim. To put it tersely, Presto's failure to reinstate the premises after having handed over vacant possession to Attic, although they promised to do so and asked for extension of time to do so, cannot be equated with their being in occupation of the premises. What Attic was seeking to do (wrongly in our view) was to claim double rental on a contractual provision in the TA (cl 12.6.1), the effect of which is that Presto is 'deemed' to be holding over (in occupation) for purposes of a claim for double rental under s 28(4) of the Civil Law Act 1956. The appeal is to that extent allowed and the order of the High Court in allowing a sum of *RM266,120.69 being the double rent from 14 July 2015 until 23 November 2015 is set aside*.

CLAUSE 5.1.4 OF THE TA — NOT PLEADED

[54] We turn next to Attic's claim under cl 5.1.4 of the TA. Under that clause Presto cannot 'determine the fixed term of the tenancy'; and if there was a 'unilateral determination' on the part of the tenant, the tenant 'shall pay to the landlord the monthly rentals and service charges in full for the unexpired period' of the fixed term.

[55] Presto's complaint before us is that Attic had not pleaded this clause in the statement of claim. We reject this ground of appeal as it completely lacks merit. From the statement of claim it is clear that Attic had made reference to the TA and specifically at para 20 it has been stated that Presto's conduct, ie issuance of the email dated 4 May 2105 and cessation of business as at 24 June

2015 amounts to a 'pre-mature' termination and a breach of the fixed term tenancy and at paras 24 to 28, it has been pleaded that Presto stands liable to pay the monthly rentals and service charges etc for the unexpired period of the fixed term tenancy. It is also not without significance that the pleading point was not raised before the High Court. Lastly, the issue as to whether Presto was in breach of the TA and the pre-mature termination were also crafted as issues to be tried. The relevant issues (Nos 5 and 6) in the *Isu-Isu Untuk DiBicarakan* dated 28 November 2017 reads as '(5) Sama ada Defenden Pertama telah memungkiri terma-terma Perjanjain tersebut?' and '(6) Sama ada Defenden Pertama telah menamatkan penyewaan tersebut secara pra-matang? Jika ada, sama ada Plaintif berhak menuntut kehilangan sewa atas penamatan penyewaan tersebut secara pra-matang'. Having regard to the pleadings, issues to be tried, documents presented at the trial and the manner in which the trial was conducted, we think that the pleading issue is a complete non-starter.

[56] We are therefore inclined to agree with the submissions that were made on behalf of Attic that in the statement of claim they had pleaded sufficient and material facts which disclosed a reasonable cause of action against Presto, Azrin and Daniel as they are all bound by the terms of the TA, inclusive of, but not limited to cl 5.1.4 of the TA.

THE GUARANTEE

[57] We deal now with the guarantee.

[58] The appellants claim that before the tenancy could be renewed, Attic insisted that Azrin and Daniel (Directors of Presto and a husband-and-wife team) execute personal guarantees indemnifying Attic for loss of rentals. It is alleged that Attic 'pressured and coerced' Azrin and Daniel to sign the guarantee. And they signed it. It is clear from the evidence that Azrin and Daniel executed the guarantee by which they agreed to guarantee and undertake to pay on demand all monies owing to Attic by Presto including all outstanding rental, deposits, costs, charges and expenses arising from or incidental to the tenancy and to indemnify Attic against all loss, damage, costs, charges and expenses which they may suffer arising from or incidental to the tenancy.

[59] But they have alleged that guarantee was entered without free consent/duress. We note that only Daniel testified (DW2) and he did not give any evidence regarding the issue of the purported duress in his witness statement to dispute liability as the guarantors under the guarantee. Indeed, as rightly submitted for Attic, Azrin and Daniel never disputed the validity of the guarantee until Attic filed the suit.

[60] The evidence further showed that before executing the guarantee, they had been properly advised by their own solicitors wherein they are deemed to have understood the nature and effect of the guarantee. Further, they have actually commented on the draft guarantee before finalising the same. Indeed, to drill down to the fine details, it becomes altogether clear that the reason why Attic insisted on the guarantee by Attic's directors was because of their lack of timeliness in making the rental payments and request for rental rebates. This was clearly and unequivocally alluded to by PW1 in her oral testimony.

[61] In the circumstances, we are impelled to the conclusion that Azrin and Daniel are jointly liable to Attic's claim against Presto and the learned judge had not erred and did not misdirect himself in allowing Attics claim against Azrin and Daniel. In the result, Azrin and Daniel had plainly failed to prove on a balance of probabilities that the guarantee was the product of pressure or coercion or duress which was allegedly exerted by Attic on them. That in a nutshell is our conclusion on the validity of the guarantee.

THE PREMISES — NOT TENANTABLE (FUNDAMENTAL BREACH)

[62] We had earlier touched on the Beca Report and as to how rampant these incidents were. We accept that they were not a few incidents but it seems more likely that they were recurring issues. We cannot say with certainty that there were at least 80 incidents of flooding/leakage over four years, but there were several incidents over the four years — perhaps enough to irritate, annoy any supermarket operator and hinder the passage of human traffic into and out of the supermarket.

[63] We now deal specifically with the issue of whether as a consequence of the lower ground floor flooding and/or water leakage issues, the premises was unfit for purpose as a boutique supermarket, and Attic had failed to resolve these issues and had thereby committed a fundamental breach of the TA which went to the root of the contract. Having considered the matter carefully, and having due regard to the comprehensive written submissions and the extensive oral clarification before us, we find that there is no appealable error to warrant any appellate interference in this case. In our view the learned judge, having considered all the evidence, was fully entitled to reach his evaluative judgement as per the grounds of judgment. Although the appellants criticised the judge's approach and reasoning, we are not persuaded that the judge's approach was erroneous, the reasoning flawed, or the conclusions wrong.

[64] In amplification of our conclusion which is stated in general terms as above, it is clear that throughout the period of the tenancy (of approximately four years), Presto enjoyed positive growth in customer traffic; enjoyed positive growth in monthly average sales; and achieved best performance status among

all other outlets of Presto supermarket chain.

[65] We have trawled through the evidence, and we find that the issues raised in regards to external flooding issues which affected the lower ground floor carpark and the water leakage issues were not 'caused' by Attic. For instance, the leakage emanated from the tenant located above the premises (Tokyo Kitchen) and Presto's complaints were never for the same spots.

[66] Next, the flooding only occurred at the basement carpark was due to unusual heavy rainfall which also affected the whole area of the neighbourhood. There is no suggestion that flood water entered the premises. Hence, the flooding did not directly affect the premises and Presto was able to operate its business as there is a concrete slab which prevent the water from entering the premises.

[67] And quite significantly, it was established that customers could park at the ground floor and take the travellator to the lower ground straight to the entrance of the Presto Supermarket. It is important to highlight that apart from heavy rainfall, the flooding was also due to the perimeter drain not being able to hold or maintain the water capacity caused by the heavy rainfall. The perimeter drain was within the jurisdiction of the Majlis Bandaran Petaling Jaya. But Attic nevertheless carried out desludging and cleaning of these perimeter drains. DW1 was of the view that Attic could have done more in terms of the external perimeter drain. But that is his own view. And it is not inappropriate to mention that DW1's testimony must be viewed with caution in that his tenure was short and he was (*for reasons which were not elaborated upon at the trial*) not confirmed in employment. Thus, DW1's evidence may well have been rather jaundiced or prejudiced due to his unhappy employment history with Attic or its ultimate corporate owners who were his real employers.

[68] Presto's case before the High Court was that the leakage/carpark flood issue has rendered the premise untenable ie unfit for its business. But the evidence again shows that the growth in Presto's customer traffic had in fact contributed to a growth in monthly average sales. Counsel for Attic referred to the following evidence as suggesting that the premises is tenantable and that the premise is in fact, the best performing when compared to all the other supermarket's in the Presto group:

(a) the average monthly sales in Avenue K — RM800,000;

(b) the average monthly sales in Taman Tun Dr Ismail — RM290,000;

(c) the average monthly sales in Damansara Perdana — RM60,739; and

(d) the average monthly sales in Citta Mall, the premise — RM1.1m.

[69] Clearly, Presto's supermarket at Citta Mall makes it the best performing mall in terms of sales. Counsel for Attic said that there is no evidence to suggest that Presto's other outlets are facing leakage and/or flood issues. As such, their strong sales performance speaks volume as to the tenantability of the premises. And DW2 agreed during cross-examination that despite the flooding and leakage incidents there was overall a positive growth in the average customer per day. Indeed, it was put to DW2 that there was an increase of 100 people per day on average and his answer was, 'I agree my Lord'.

[70] It is important to emphasise that DW2 had testified that from 2011 until the date Presto ceased operation at the premises, Presto was open for business. Of course, DW2 qualified his answer by saying that they could not operate properly. But he agreed that Presto actually used the premises for the total of four years including the renewal term. During the four years period, Presto was able to operate its business at the premise and:

(a) enjoyed positive growth in customer traffic;

(b) enjoyed positive growth in monthly average sales; and

(c) achieved best performance among all other outlets of Presto supermarket.

[71] Besides DW2's testimony, Presto's own documents showed that they enjoyed a largely positive growth in its customer traffic. This is seen from the graphical chart outlining the traffic to the premises and a tabulation stating the growth in average customer per day. Although Presto maintained that their business was severely affected by the issues complained of in November 2012, their own evidence showed that there was a 2% growth in the same month of November 2012.

[72] It was submitted for Attic that in light of such performance by the supermarket, the allegation that the premises is untenantable appears improbable. Indeed, the following evidence (oral testimony) of DW2 is rather telling and it makes it inherently improbable that the premises was unfit or untenantable for use as a supermarket.

DW2'S TESTIMONY

> PP: Now, in your witness statement, you have raised incident of for example, for year 2012, you said that there is leakage based on your email dated 5.12.2012, alright? Now, can you please look at the chart, even in December 2012, the healthy 6% growth, despite the incident alleged, agree or disagree?
>
> DW2: It is Christmas Month. Yes I agree my lord.

PP: No no, I know it can be many factor, it could be festive season and so on, but my point is this, despite the incident, the so called leakage which you email dated 5.12.2012, 5th of December still registered a very positive growth of 6%, do you agree?

DW2: I agree my lord.

PP: Now, earlier you mentioned about Christmas, or in the December, now let take the month of November, a month of November you have actually raised a complaint because there is some flood at the carpark via your email dated, or letter dated 5.11.2012. Now if you look at the average customer per day for November 2012, there is also a growth of 2%, you agree or disagree?

DW2: I agree.

PP: You disagree? Okay I rephrase that, I said that, despite all this issue, defendant were able to use the premise and generate sales, monthly sale in the average of 1 million Ringgit per month, you agree or disagree?

DW2: I agree, My lord.

PP: Alright, then we take a year later, February 2013, now do you agree that the sales has actually improved to more than 1 million ringgit per month, do you agree?

DW2: I agree my lord.

PP: And if you look at even the subsequent year February 2014, again the sales is still above 1 million ringgit per month?

DW2: I agree my lord.

PP: Now I said that, despite the so called incident, this document shows that [Presto] was able to use the premises for the purpose for the business, do you agree or disagree?

DW2: I agree my lord.

PP: ... But when I turn to the next page, this is the outlet at Citta Mall, the monthly average sales is 1.1 million ringgit, agree or disagree?

DW2: I agree my lord.

...

PP: Now, let turn on to the following page, page 207, brief history, and I would like to read the 4th bullet, I shall read, 'in 2011 opened third and largest store with 18,500 sqf in the upcoming residential and business area Ara Damansara. Total employees have reached 65 and annual sales is exceeding RM6million', you agree? You agree with this statement that the premises in Ara Damansara that is the Citta Mall, the total annual sales exceed 6 million, do you agree?

DW2: I agree that we stated it there, yes.

PP: No, I said based on your own document on average, because you wrote here on average sale, based on your own document, the sales at Citta Mall is the highest, even higher than your nearest outlet?

DW2: Yes I agree.

[73] In our view, the evidence shows quite unmistakably that Presto was able to operate its business at the premises for four years and managed to achieve highest performance among other Presto outlets and progressive growth in sales. This is evidence which suggest quite unmistakably that the premises is indeed tenantable and fit for use as a supermarket business. We agree with Attic's stand that if the flooding/water leakage incidents had (as alleged by Presto) truly destroyed their supermarket business, then it goes against logic and common sense or business sense for Presto to renew the tenancy via the LOR. Thus, if the physical situation was intolerable and their business deteriorated, then the logical response would be to move out from the premises rather than waiting until 26 June 2015.

[74] On the same note, if the premises were truly unsuitable or untenantable, then it is curious that Presto could recommended the premises to a proposed replacement tenant, Urban Fresh in order to take over the tenancy. DW2 gave a curious response during the cross-examination when he was asked how he could recommend Urban Fresh to take over the premises despite the property being (allegedly) untenantable.

[75] DW2 said that Urban Fresh, was keen to take over the premises to carry out their supermarket business. We agree with Attic's contention and reasoning, that if Urban Fresh was keen to take over the tenancy, then this fact would not sit well with Presto's contention that the premise is untenable. This is because if it is untenantable for Presto, then it is highly unlikely and inherently improbable and illogical that Urban Fresh would not have done their research and blindly choose the premises to do its supermarket business. DW2's cross-examination on this point was as follows:

PP: Now, your version has always been the premises is not tenantable, now my question is that, do you agree that when you are, by the time you want to move out from the premises, do you agree that you have recommended a new supermarket operator to take over the premises, do you agree?

DW2: I agree.

PP: In fact you have recommended another supermarket known as Urban Fresh to take over the premises? The premises that were occupied by Presto, do you agree?

DW2: I agree my lord.

PP: Now, I say that, if the premises is not fit for supermarket business, you would have not recommended other people to take over the same premises? You agree or disagree?

DW2: No, disagree.

PP: So your testimony in this court is that, despite that it is not, to your version is

not tenantable, you are more than happy to ask other to take over, is that your version? Are you saying that?

DW2: Yes, that is what I am saying.

PP: Now can please tell this court whether Urban Fresh is keen to take over the Premises?

DW2: From our discuss I think yes.

[76] Ultimately, the learned judge made a finding that Attic had taken all reasonable and necessary steps in relation to the flooding and water leakage issues. Here it is pertinent to mention at Q&A 24 and 27 of her witness sStatement, PW1 testified that Attic did attend to each and every one of Presto's complaints with regards to the issues of flooding and water leakage. She testified that Attic carried out maintenance and cleaning regularly according to their standard operating procedures.

[77] In this regard, Attic engaged and appointed third party service providers (contractors) ie Weimar Enterprise Sdn Bhd to provide sewerage service and Ace Cleaning Service Sdn Bhd. Attic also regularly attended to the drainage system (water pump) repair and maintenance and sludge removal work. PW1 also testified that Attic had also installed an additional water pump in 2014 in an attempt at resolving the flooding issue. In the circumstances, viewing the evidence as a whole, we are impelled to the view that this is not a case where Attic had flagrantly, miserably or blatantly failed or refused to attend to or rectify the issues as and when they arose. The question as to whether Attic had taken all reasonable and necessary steps to maintain and resolve the issues raised by Presto is very fact sensitive. Generally, it is not a question that is fit or appropriate to be answered by an appellate court.

[78] We say generally because there could well be cases where the evidence is so overwhelming such that the question can only be answered one way, and not the other. The present case is certainly not such a case. Indeed, we are satisfied that the learned judge's conclusions are not 'plainly wrong' and are in fact supportable on a rational basis. In our view, the learned judge's findings are not in any sense repugnant to common sense. We feel compelled to refer to the following passage from the Federal Court's decision in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1; [2020] 8 AMR 227 (FC) where it was said:

> As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be

accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[79] It is clear that throughout the period of the tenancy (of approximately four years), Presto enjoyed positive growth in customer traffic; enjoyed positive growth in monthly average sales; and achieved best performance among all other outlets of Presto supermarket. From our reading of the evidence, it is quite obvious that the issues raised in regards to external flooding issues which affected the lower ground floor carpark and the water leakage issues were not 'caused' by Attic. For instance, the leakage emanated, inter alia, from the business located above the premises (eg Tokyo Kitchen) and Presto's complaints were never for the same spots.

[80] Next, the flooding only occurred at the basement carpark and was due to unusual heavy rainfall which also affected the whole area of neighbourhood. The flood water never entered the premises.

[81] The flooding never affected the premises in that Presto was able to operate its business as there is a concrete slab which prevented the water from entering the premises. And quite significantly, it was established that customers could park at the ground floor and take the travellator to the lower ground quite literally to the entrance of the Presto Supermarket. It is important to highlight that apart from heavy rainfall, the flooding was also due to the perimeter drain not being able to hold or maintain the water capacity caused by the heavy rainfall. The perimeter drain was within the jurisdiction of the Majlis Bandaran Petaling Jaya. But Attic nevertheless carried out desludging and cleaning of these perimeter drains. Ultimately, the learned judge made a finding that Attic had taken all reasonable and necessary steps in relation to the flooding and water leakage issues.

[82] Here it is pertinent to mention at Q&A 24 and 27 of her witness statement, PW1 testified that Attic did attend to each and every one of Presto's complaints with regards to the issues of flooding and water leakage. She testified that Attic carried out maintenance and cleaning regularly according to their standard operating procedures. In this regard, Attic engaged and appointed third party service providers (contractors) ie Weimar Enterprise Sdn Bhd to provide sewerage service and Ace Cleaning Service Sdn Bhd. Attic also regularly attended to the drainage system (water pump) repair and maintenance and sludge removal work. PW1 also testified that Attic had also installed an additional water pump in 2014 in an attempt at resolving the flooding issue.

[83] In the circumstances, viewing the evidence as a whole, we are impelled to the view that this is not a case where Attic had flagrantly, miserably or

A blatantly failed or refused to attend to or rectify the issues as and when they arose. The question as to whether Attic had taken all reasonable and necessary steps to maintain and resolve the issues raised by Presto is very fact sensitive.

B **[84]** Generally, it is not a question that is fit or appropriate to be answered by an appellate court. We say generally because there could well be cases where the evidence is so overwhelming such that the question can only be answered one way, and not the other. The present case is certainly not such a case. Indeed, we are satisfied that the learned judge's conclusions are supportable on a rational basis and his findings are not in any sense repugnant to common sense.

C

[85] For the reasons stated above, we are equally impelled to the conclusion that Presto has not established that Attic was guilty of any fundamental breach of the TA which went to the root of the contract. Similarly, we are satisfied that

D Presto had not established any negligence against Attic. The evidence showed quite convincingly that Attic did everything they could to ameliorate the situation, which was not of their own doing.

[86] Of course, on hindsight it is easy to say that more could have been done.

E And perhaps more could in fact have been done. But the central question is whether in light of these external and internal water related issues, there was a fundamental breach on Attic's part, or to put it more dramatically as was done by Presto, these recurrent issues had 'destroyed' their supermarket business. Looking at all the evidence that was adduced at trial, we cannot say that Presto

F has established that the flooding/water leakage had destroyed the supermarket. That is a gross exaggeration of the true situation. To conclude, we find that there was no fundamental breach of the tenancy by Attic.

[87] As stated earlier, there was no negligence that was established against

G Attic. Indeed, it is relevant here to remind ourselves that the relationship here is entirely contractual and it would be an uphill task to foist a duty of care on Attic (qua landlord) and hold them liable for external events such as perimeter drain flooding and water leakage due to operations run by individual business operators over whom Attic has no control.

H

[88] Lastly, we would quote Lord Scarman in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others* [1985] 3 WLR 317 (at p 330) where the learned judge said, 'Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly

I or by necessary implication in their contract'. Similarly, we take the view that the claim in negligence against Attic is untenable and was rightly dismissed by the learned judge.

[89] We have already concluded that Attic did not commit any fundamental

breach of contract as alleged by Presto. At any rate, on the facts herein, even if there was any breach of contract or breach of duty of care and Presto suffered any loss and/or damage due to such breach of contract (per the TA) or any breach of duty of care, Attic is immune from liability by reason of the application of cl 26 of the TA.

OUTCOME

[90] For the reasons stated and conclusions reached under the heading 'Double Rental' (at paras 44–52 of this judgment), the appeal is partly allowed and the order of the High Court in allowing a sum of RM266,120.69 being the double rent from 14 July 2015 until 23 November 2015 is set aside. For the reasons stated above, the appeal is otherwise dismissed.

COSTS

[91] Hence, the plaintiff's claim is allowed save for the claim for double rental. The defendant's counterclaim is dismissed. The decision of the High Court dated 26 June 2019 is therefore affirmed, save for the award of RM266,120.69 which has been set aside. In the circumstances, since the sum of RM266,120.69 represents approximately 32% of the judgment that was awarded by the learned judge, we think that this is an appropriate case for us to exercise our discretion and we hereby make no order as to costs of this appeal.

Order accordingly.

Reported by Ashok Kumar